Supreme Court, U.S.
FILED

No. 01- 011811 JUN 10 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID R. JANSEN, WILLIAM J. LORENCE, and N. PETER KNOLL,

Petitioners,

v.

US BANK NATIONAL ASSOCIATION, ND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

N. PETER KNOLL
815 Emery Street
Longmont, CO 80501
(303) 774-8013

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioners

QUESTION PRESENTED

Whether a district court may approve, over objection, a class action settlement and award of attorneys' fees and expenses without providing a reasoned explanation of its decision?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners David R. Jansen, William J. Lorence, and N. Peter Knoll were objecting class members and intervenors in the district court and appellants in the court of appeals.

The respondents in this Court, all of whom were appellees in the court of appeals, are:

> Defendants US Bank National Association, ND, formerly known as First Bank of South Dakota, N.A.; US Bancorp Insurance Services, Inc.; and US Bancorp, formerly known as First Bank Systems;
>
> and
>
> Plaintiffs James D. Koenig, on behalf on himself, and the class of similarly situated consumers; Phillippa Saunders, on behalf of herself and others similarly situated; Barbara A. Mans; Michael J. Mans, individually, and on behalf of all others similarly situated; Chris Somers, individually, and on behalf of a class of all others similarly situated; Anne Bergman; Kathryn Rosebear, on their own behalf and on behalf of all others similarly situated; Jane Korn; Robert Madoff, on their on own behalf and on behalf of all others similarly situated; Brent Johnson; Bill Rooney, individually, and on behalf of all others similarly situated; Daniel P. Mallove; Timothy Gaillard; Cynthia Gaillard; and Mary Scalise.

Anne Knoll was an intervenor in the district court.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
FEDERAL RULES INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 6

I. The Eighth Circuit's Decision Conflicts with Decisions from Numerous Other Circuits. 7

II. The Failure To Require District Courts To Articulate Their Reasoning Conflicts with Decisions of This Court and Makes Review for Abuse of Discretion Impossible 11

III. This Case Raises Important National Issues that Should Be Resolved by This Court. 15

CONCLUSION 16

TABLE OF AUTHORITIES

Pages

Cases

Armstrong v. *Board of School Directors*, 616 F.2d 305 (CA7 1980), *overruled in part on other grounds by Felzen* v. *Andreas*, 134 F.3d 873 (CA7 1998), *aff'd by an equally divided court*, 525 U.S. 315 (1999) 10

Bowling v. *Pfizer, Inc.*, 132 F.3d 1147 (CA6 1988) 9

Brown v. *Phillips Petroleum Co.*, 838 F.2d 451 (CA10), *cert. denied*, 488 U.S. 822 (1988) 9

Bryan v. *Pittsburgh Plate Glass Co. (PPG Indus., Inc.)*, 494 F.2d 799 (CA3), *cert. denied*, 419 U.S. 900 (1974) 7

Camden I Condominium Assoc., Inc. v. *Dunkle*, 946 F.2d 768 (CA11 1991) 9

DeBoer v. *Mellon Mortgage Co.*, 64 F.3d 1171 (CA8 1995), *cert. denied*, 517 U.S. 1156 (1996) 5, 10, 13

Eichenholtz v. *Brennan*, 52 F.3d 478 (CA3 1995) 7

Grunin v. *International House of Pancakes*, 513 F.2d 114 (CA8), *cert. denied*, 423 U.S. 864 (1975) 12

Gunter v. *Ridgewood Energy Corp.*, 223 F.3d 190 (CA3 2000) 8, 12

Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 9, 13

In re American Reserve Corp., 841 F.2d 159 (CA7 1987) 10

In re Corrugated Container Antitrust Litig., 643 F.2d 195 (CA5 1981), *cert. denied*, 456 U.S. 998 (1982) 7, 15

In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (CA7), *cert. denied*, 444 U.S. 870 (1979) 11

In re Mego Fin. Corp. Sec. Litig., 213 F.3d 454 (CA9 2000) 8

Kaplan v. *Rand*, 192 F.3d 60 (CA2 1999) 15

Maher v. *Zapata Corp.*, 714 F.2d 436 (CA5 1983) 7

McDonald v. *Chicago Milwaukee Corp.*, 565 F.2d 416 (CA7 1977) 11

Piambino v. *Bailey*, 610 F.2d 1306 (CA5), *cert. denied*, 449 U.S. 1011 (1980) 9

Pigford v. *Glickman*, 206 F.3d 1212 (CADC 2000) 8, 14

Plummer v. *Chemical Bank*, 668 F.2d 654 (CA2 1982) 8

Powers v. *Eichen*, 229 F.3d 1249 (CA9 2000) 9

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. *Anderson*, 390 U.S. 414 (1968) 10, 13

United States v. *Comunidades Unidas Contra la Contaminacion*, 204 F.2d 275 (CA1 2000) 10

Van Horn v. *Trickey*, 840 F.2d 604 (CA8 1988) 10, 12, 13

Statutes

15 U.S.C. § 1681 3

28 U.S.C. § 1254(1) 2

Rules

Federal Rule of Civil Procedure 23 2

Federal Rule of Civil Procedure 54 ..... 2, 13

Other Authorities

Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS (1996)..... 16

John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995)..... 15

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991)..... 16

Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379 (1995) 15

IN THE

Supreme Court of the United States

DAVID R. JANSEN, WILLIAM J. LORENCE, and N. PETER KNOLL,

Petitioners,

v.

US BANK NATIONAL ASSOCIATION, ND, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The district court's unpublished orders preliminarily and finally approving the proposed settlement and entering a final judgment are reproduced herein as Appendices B and C (pages B1-B6 and C1-C4). The Eighth Circuit's corrected opinion affirming the district court will be published in F.3d, is currently available at 2002 WL 1063956, and is reproduced herein as Appendix A (pages A1-A5). The Eighth Circuit's denials of petitions for rehearing and rehearing *en banc* are

unpublished and are reproduced as Appendices E and F (pages E1 and F1).

JURISDICTION

The Eighth Circuit issued its initial opinion on January 15, 2002, a corrected opinion on January 25, 2002, and orders denying petitions for rehearing and rehearing *en banc* on March 12, 2002. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULES INVOLVED

This case involves the approval of settlement agreements in class action cases pursuant to Federal Rule of Civil Procedure 23(e), which provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to members of the class in such manner as the court directs.

It also involves Federal Rule of Civil Procedure 54(d)(2), which provides, in relevant part:

> (A) Claims for attorneys' fees and related non-taxable expenses shall be made by motion * * *
>
> (C) * * * The court shall find the facts and state its conclusions of law as provided in Rule 52(a) * * *.

STATEMENT OF THE CASE[1]

This case involves a class action on behalf of banking and credit card accountholders of the defendants US Bancorp and its subsidiaries (collectively the "Bank"), alleging that the Bank unlawfully supplied confidential customer account information to unaffiliated third parties for marketing purposes.

---

[1] Unless otherwise noted, the facts are taken from the Eighth Circuit and district court opinions, attached as Appendices A through C, and from the Stipulation of Settlement, attached as Appendix D.

The suit consists of ten consolidated class actions, the first of which was filed three days after the Minnesota Attorney General Mike Hatch sued the Bank alleging that such disclosure of confidential information violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, and Minnesota statutes prohibiting false advertising and deceptive trade practices. *See Hatch* v. *US Bank*, Civ. No. 99-872 (D. Minn., filed June 8, 1999); *Koenig* v. *US Bank National Association, ND*, Civ. No. 99-891 (D. Minn., filed June 11, 1999).

On June 30, 1999, the Bank settled with the Minnesota Attorney General, agreeing to certain injunctive and monetary relief. More than 35 other States later joined that settlement.

Following the settlement of the Minnesota Attorney General's suit, this consolidated class action quickly settled before the end of 1999. The preliminary order approving that settlement was entered on July 5, 2000. App. B1.

Excluding amounts paid by the Bank under its settlement of the Minnesota Attorney General's suit, the settlement in this case provided that the Bank would pay a total of $3.5 million dollars, with up to $1.25 million of that going toward class counsel fees, up to $40,000 going toward class counsel expenses, and $10,000 going to the named class representatives. The remaining approximately $2.2 million was to be distributed among up to 4 million class members based upon the submission of convoluted claim forms that sought to distinguish among various class members and, in particular, created disparate recovery standards as between checking and credit card accountholders.

Following notice of the proposed settlement, approximately 70 unnamed class members, including petitioners Knoll, Jansen, and Lorence, filed objections. In addition to filing written objections, petitioners also appeared at the fairness hearing to reiterate various of their objections in person. Those objections included, *inter alia*, concerns over: The unequal and less favorable treatment of credit card holders as

compared to checking account customers; the extremely low amounts expected to be paid to class members filing claims; the complete lack of anticipated payment to the vast majority of class members; the unwieldiness of the claims procedure for payments; the tremendous disparity in recoveries between named class representatives and other class members; and the excessive and non-itemized attorneys' fees and expenses, particularly given the lack of any significant litigation in this case, the path-clearing suit and settlement by the Minnesota Attorney General, and the early settlement in this case.

The district court's order and final judgment approving the settlement contained a total of four conclusory sentences referencing the objections and the fairness of the settlement and award of attorneys fees and expenses:

> [T]he Court, in making its determination, has considered the remarks of the three individuals [*sic*] objectors appearing at the hearing.
>
> * * *
>
> The Stipulation of Settlement is approved as fair, reasonable, adequate and in the best interests of the Class. The written and oral comments of the objectors were not sufficient to lead the [C]ourt to conclude that the settlement was not fair and adequate or to cause the Court to reject the settlement.
>
> * * *
>
> Class Counsel are awarded attorneys' fees and reimbursement of expenses in the aggregate amount of $1,250,000 in fees and $40,000 in expenses, which sums the Court finds to be fair and reasonable and shall be paid in accordance with the Stipulation.

App. C2-C4. Those sentences constituted the entirety of the district court's "reasoning," and its full answer to the many objections.

Petitioners intervened and appealed, arguing, *inter alia*, that the settlement was not fair, reasonable, and adequate, that the attorneys' fees and expenses were excessive and unsupported, and that the district court had failed to support its decision with reasoned findings and conclusions.

The Eighth Circuit, after rejecting a challenge to petitioners' standing, affirmed. Once again, the "reasoning" offered in support of the reasonableness of the settlement, fees, and expenses was exceedingly thin:

> We also find the district court adequately stated its reasons for approving the settlement agreement and the fee award by stating on the record that the agreement was fair and reasonable and by rejecting the objectors' arguments.

App. A4. Perhaps recognizing the frivolousness of that finding, the court of appeals bolstered its result by denying any obligation for a district court to provide reasoned findings and instead placed the entire burden of demonstrating that the result was *un*fair on petitioners:

> Besides, the intervenors have not shown the record establishes that the agreement was unfair. *See DeBoer* [v. *Mellon Mortgage Co.*], 64 F.3d [1171,] 1177 [(CA8 1995)] (in absence of specific findings regarding fairness of settlement, this court assumes district court did not abuse its discretion unless record establishes to contrary).

Id.

Turning to the fees and expenses, the court of appeals simply approved them in the abstract, again without regard for the lack of findings by the district court:

> [T]he $1.25 million fee award represents approximately 36% of the settlement fund. We have approved the percentage-of-recovery methodology to evaluate attorneys' fees in a common-fund settlement such as this, *see Petrovic* v. *Amoco Oil Co.*, 200 F.3d 1140, 1157

(8th Cir. 1999), and we find no abuse of discretion in the district court's awarding 36% to class counsel who obtained significant monetary relief on behalf of the class, *see id.* at 1156 (district court's decisions regarding attorneys' fees in class action settlement will generally be set aside only upon showing of abuse of discretion; to recover fees from common fund, attorneys must demonstrate that their services were of some benefit to fund or enhanced adversarial process).

* * *

[W]e find the $40,000 cost award to class counsel for their out-of-pocket expenses was appropriate, *see Keslar* v. *Bartu,* 201 F.3d 1016, 1017 (8th Cir. 2000) (per curiam) (finding no abuse of discretion in $17,000 cost award when case settled for $70,000) * * *.

App. A5. In reaching such *de novo* conclusions, the Eighth Circuit offered no analysis of whether the district court correctly exercised its discretion or considered the relevant substantive factors governing fees and expenses. Indeed, the court of appeals gave no apparent consideration whatsoever to the specific facts in this case that might support or refute the fees and expenses awarded.

Petitioners sought rehearing and rehearing *en banc*, both of which were denied. App. E1 & F1.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Eighth Circuit's holding that a settlement approval may be affirmed notwithstanding the absence of any explanation by the district court of its reasoning in approving the settlement, attorneys' fees, and expenses, conflicts with decisions from other circuits, is in tension with the holdings of this Court, and presents an important national issue concerning class-action settlements that should be addressed by this Court.

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM NUMEROUS OTHER CIRCUITS.

The Eighth Circuit has adopted a rule of review that *assumes* a district court properly exercised its discretion in approving a settlement and award of fees and expenses, even in the complete absence of any reasoned explanation by the district court. That rule conflicts with the rule in the Third, Fifth, and Ninth Circuits, which require a meaningful and reasoned explanation from a district court and which will not accept mere boilerplate settlement approvals. *See, e.g.*, *Eichenholtz* v. *Brennan*, 52 F.3d 478, 488 (CA3 1995) ("in order to provide for meaningful appellate review, a district court must explain its reason for approving a class action settlement agreement"); *Bryan* v. *Pittsburgh Plate Glass Co. (PPG Indus., Inc.)*, 494 F.2d 799, 804 (CA3) ("It is essential in [class action settlement] cases such as this that the district court set forth the reasoning supporting its conclusion in sufficient detail to make meaningful review possible; use of 'mere boilerplate' language will not suffice.") (citation omitted), *cert. denied*, 419 U.S. 900 (1974); *Maher* v. *Zapata Corp.*, 714 F.2d 436, 455 (CA5 1983) (district court "must state its reasons for approving [settlement of a shareholders' derivative suit] and should examine a proposed settlement in light of the objections raised to it, and set forth with sufficient detail a reasoned response to them, including supportive findings of fact and conclusions of law as may be necessary, so that an appellate court, in the event of an appeal, will have a basis for conducting a meaningful review of the exercise of the district court's discretion."); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212, 218 (CA5 1981) ("[T]he district court judge must 'undertake an analysis of the facts and the law relevant to the proposed compromise,' and he must 'support his conclusions by memorandum.' * * * 'A "mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law" will not suffice.'") (citations omitted), *cert. denied*, 456 U.S. 998

(1982); *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (CA9 2000) ("'Assessing a settlement proposal requires a district court to balance a number of factors' * * *. The district court must show that it has explored these factors comprehensively to survive appellate review.") (citation omitted).[2]

The same courts, plus the Sixth, Tenth, and Eleventh Circuits have likewise required reasoned explanations from district courts for awards of attorneys' fees and expenses. *See, e.g.*, *Gunter* v. *Ridgewood Energy Corp.*, 223 F.3d 190, 196 (CA3 2000) ("Notwithstanding our deferential standard of review, it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion. * * * [I]f the district court's fee-award opinion is so terse, vague, or conclusory that we have no basis to review it, we must vacate the fee-award order and remand for further proceedings. * * * For us to act as seers and to attempt to soothsay what was on the district court's mind when setting a fee award is a waste of judicial resources. Moreover, if a district court does not fulfill its duty to apply the relevant legal precepts to a fee application, it

---

[2] The Second Circuit has recognized, with seeming favor, the majority rule, but has not formally adopted it as its own. *See Plummer* v. *Chemical Bank*, 668 F.2d 654, 659 (CA2 1982) ("Some Circuits have held that the district court must make findings of fact and conclusions whenever the propriety of a settlement is in dispute. [citing cases from Second, Fifth, and Ninth Circuits.] If Title VII class settlements are to be treated henceforth as injunctions for purposes of appeal, * * * it would seem that findings and conclusions should be made with respect to every controverted settlement in order to permit intelligent review.") (citations omitted). The D.C. Circuit has likewise expressed a desire for evidence of reasoned analysis by district courts. *Pigford* v. *Glickman*, 206 F.3d 1212, 1217 (CADC 2000) ("The appellate court is not to substitute its views of fairness for those of the district court and the parties to the agreement, * * * but is only to determine whether the district court's reasons for approving the decree evidence appreciation of the relevant facts and reasoned analysis of those facts in light of the purposes of Rule 23.") (citation omitted).

abuses its discretion by not exercising it."); *Piambino* v. *Bailey*, 610 F.2d 1306, 1328 (CA5) ("'The court should enter findings of fact and conclusions of law setting out the basis for the fee award and adequately presenting the issue for further appellate review should this be necessary.'") (citation omitted), *cert. denied,* 449 U.S. 1011 (1980); *Bowling* v. *Pfizer, Inc.*, 132 F.3d 1147, 1151-52 (CA6 1988) ("'It remains important * * * for the district court to provide a concise but clear explanation of its reasons for the fee award.' * * * Fees aside, it does not appear that Judge Spiegel or the trustees made any particularized inspection of class and special counsel's expense request. A simple rubber stamp is insufficient.") (quoting *Hensley* v. *Eckerhart,* 461 U.S. 424, 437 (1983)); *Powers* v. *Eichen*, 229 F.3d 1249, 1256, 1258 (CA9 2000) ("[T]he district court must specify its reasons for approving a particular attorneys' fees award so that we may conduct meaningful review. * * * Many of the factors discussed at the hearing may have supported the fee award, but the district court never stated the grounds on which it ultimately relied. * * * Because the district court failed to specify adequately the basis for its decision, it abused its discretion."); *Brown* v. *Phillips Petroleum Co.*, 838 F.2d 451, 454 (CA10) ("the district court must 'articulate specific reasons for fee awards to give us an adequate basis' * * * to review the reasonableness of the percentage and thus the reasonableness of the fee award.) (citation omitted), *cert. denied,* 488 U.S. 822 (1988); *Camden I Condominium Assoc., Inc.* v. *Dunkle*, 946 F.2d 768, 775 (CA11 1991) ("In order to facilitate this court's review * * * the district court should articulate specific reasons for selecting the percentage upon which the attorneys' fee award is based. The district court's reasoning should identify all factors upon which it relied and explain how each factor affected its selection of the fund awarded as fees.").

In contrast to the broadly accepted requirement for district courts to articulate their reasoning, the Eighth and the First

Circuits excuse the absence of reasoned findings by the district court and either assume the proper exercise of discretion or make their own – effectively *de novo* – determination of the reasonableness of a settlement and related matters. *See, e.g., DeBoer* v. *Mellon Mortgage Co.*, 64 F.3d 1171, 1177 (CA8 1995) ("In the absence of specific findings regarding the fairness of the settlement, we must assume that the district court did not abuse its discretion unless the record establishes the contrary. *See Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson,* 390 U.S. 414, 437 (1968) (remand not necessary where 'the record contain[s] adequate facts to support the decision of the trial court to approve the proposed compromises')."), *cert. denied,* 517 U.S. 1156 (1996); *Van Horn* v. *Trickey*, 840 F.2d 604, 607 (CA8 1988) ("[I]f the record contains facts supporting the district court's approval of the settlement, 'a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based.'") (quoting *Protective Comm.*, 390 U.S. at 437); *United States* v. *Comunidades Unidas Contra la Contaminacion*, 204 F.2d 275, 279-81 (CA1 2000) (quoting *Protective Committee* and, confronted with a "conclusory recitation in the decree" electing its own review of the record to make the determination lacking below, citing *Van Horn*).[3]

---

[3] The Seventh Circuit has somewhat inconsistent holdings on the necessity of articulated reasoning in various contexts. *Compare In re American Reserve Corp.*, 841 F.2d 159, 162 (CA7 1987) ("bankruptcy judge must also give the reviewing court 'some basis for distinguishing between well-reasoned conclusions arrived at after comprehensive consideration of all relevant factors, and mere boilerplate approval * * * unsupported by evaluation of the facts or analysis of the law.' [*Protective Comm.*, 390 U.S. at 434.] In other words, the bankruptcy judge must make findings and explain his reasoning sufficiently to show that he examined the proper factors and made an informed and independent judgment."); *Armstrong* v. *Board of School Directors*, 616 F.2d 305, 315 (CA7 1980) ("the district court must clearly set forth in the record its reasons for approving the settlement in order to make meaningful appellate review possible"), *over-*

Given the substantial split regarding the necessity of reasoned decisions when approving settlements, attorneys' fees, and expenses, and the Eighth Circuit's persistent adherence to the minority position, this issue is appropriate and ripe for review.

II. THE FAILURE TO REQUIRE DISTRICT COURTS TO ARTICULATE THEIR REASONING CONFLICTS WITH DECISIONS OF THIS COURT AND MAKES REVIEW FOR ABUSE OF DISCRETION IMPOSSIBLE.

This case also warrants review because the decision of the Eighth Circuit conflicts with the decisions of this Court and with basic principles of appellate review. In particular, it conflicts with this Court's repeated emphasis on the need for reasoned and articulated decision making at the trial level in order to facilitate appellate review. And it *de facto* substitutes *de novo* review for abuse-of-discretion review on issues where both the right and the obligation to exercise discretion rests with the district court.

District court approval of class-action settlement agreements, attorneys' fees, and expenses is subject to review for abuse of discretion. A district court's discretion in these areas, while generally broad, must be exercised within a legal framework that sets forth the various factors for determining the reasonableness and propriety of a settlement, attorneys' fees, and expenses. When considering whether a settlement is

---

ruled in part on other grounds by Felzen v. *Andreas*, 134 F.3d 873 (CA7 1998), *aff'd by an equally divided court*, 525 U.S. 315 (1999); *and In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 n. 44 (CA7) ("The trial court, however, does have a duty to members of the class and to the reviewing court to assess, if not decide, the issues of law which weigh heavily in the [settlement fairness] calculus and to consider the most probative evidence bearing on those issues."), *cert. denied*, 444 U.S. 870 (1979), *with McDonald* v. *Chicago Milwaukee Corp.*, 565 F.2d 416, 428 (CA7 1977) (quoting language from *Protective Committee* regarding reluctance to reverse solely based on court's failure "'adequately to set forth its reasons'").

fair and reasonable, for example, a "district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement." *Van Horn*, 840 F.2d at 607 (citing *Grunin* v. *International House of Pancakes,* 513 F.2d 114, 124 (CA8), *cert. denied,* 423 U.S. 864 (1975)). Similarly, when considering requests for class attorneys' fees and expenses, a district court must take into account a variety of factors, including

> (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases. * * * In mainstream [common-fund] cases, such as this one, we have also suggested that district courts cross-check the percentage award at which they arrive against the "lodestar" award method, which is normally employed in statutory fee-award cases.

Gunter, 223 F.3d at 195 n. 1. And even application of the lodestar method involves considerable analysis. *Id.* In the absence of a reasoned explanation of the district court's treatment of those various factors, it is simply impossible to ascertain whether a district court even has *exercised* its discretion, much less whether it abused that discretion.

In the face of this self-evident problem with the lack of district court findings and analysis, the Eighth Circuit generally relies on a single sentence in this Court's decision in *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*:

> If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based.

390 U.S. 414, 437 (1967). The Eighth Circuit then converts that suggested reluctance into a presumption of sound decision making notwithstanding the lack of articulated reasoning, and effectively undertakes *de novo* review if necessary to support that presumption. *See* App. A4; *DeBoer*, 64 F.3d at 1177; *Van Horn*, 840 F.2d at 607.

The trouble with that approach is that the *Protective Committee* language is pure *dicta* and says far less than the Eighth Circuit takes it for. Far more significant than that *dicta* is this Court's extensive discussion and actual holding in *Protective Committee* regarding the central importance of clearly articulated analysis by district courts. As this Court explained: "It is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." 390 U.S. at 434. This Court proceeded to remand the case because the record left the Court "completely uninformed as to whether the trial court ever evaluated the merits of the causes of actions held by the debtor, the prospects and problems of litigating those claims, or the fairness of the terms of compromise." *Id.* at 440.

This Court has similarly emphasized, in the specific context of attorneys' fees, that it "remains important * * * for the district court to provide a concise but clear explanation of its reasons for the fee award." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). Federal Rule of Civil Procedure 54(d)(2) confirms and memorializes the importance of such an explanation by requiring district courts to make findings of fact and

conclusions of law in support of fee awards. Such guidance from this Court and the Federal Rules in the context of settlements and fee awards is far more telling than the *dicta* relied upon by the Eighth Circuit, and conflicts with the decision in this case.

The Eighth Circuit's approach also suffers from the defect of distorting the fundamental nature of abuse-of-discretion review. Regardless of whether the record contains facts that might support the district court's *result*, such facts will, in most cases, tell a reviewing court nothing about whether the trial court properly exercised its discretion in reaching that result. The very nature of such discretion implies that there is a broad range of potentially *permissible* results from an appellate perspective, and that it is up to the trial court to exercise its judgment as to which potentially permissible result is the one that will be approved in a particular case.

By looking directly to the record itself, rather than to the district court's analysis of the record, a reviewing court violates the fundamental principle that it

> is not to substitute the views of fairness for those of the district court and the parties to the agreement, * * * but is only to determine whether the district court's reasons for approving the decree evidence appreciation of the relevant facts and reasoned analysis of those facts in light of the purposes of Rule 23.

Pigford, 206 F.3d at 1217 (citation omitted). As the Fifth Circuit has correctly recognized, where

> the district judge has failed to support his approval of the settlements by adequate evaluation of the facts and analysis of the law, we lack a basis for reviewing his discretion. * * * Thus, were we at this juncture to affirm the approval of the settlements, we would not be reviewing the district court's exercise of discretion but, rather, exercising our own discretion on the basis of the

> record before us. This is not our function, and we therefore must remand to the district court.

Corrugated Container, 643 F.2d at 218 (citation omitted).

III. This Case Raises Important National Issues that Should Be Resolved by This Court.

The divergent views in the courts of appeals regarding the necessity of reasoned findings and conclusions by district courts when they approve class action settlements and fees presents an important issue that affects the substantial rights of many millions of potential class members. The need for diligence by the district courts is at its peak in the context of class action settlements because there is nobody else watching out for the interests of unnamed class members. "It is no secret that in 'seeking court approval of their settlement proposal, plaintiffs' attorneys' and defendants' interests coalesce and mutual interest may result in mutual indulgence.'" *Kaplan* v. *Rand*, 192 F.3d 60, 67 (CA2 1999) (citation omitted). Such mutual indulgence can be expected to continue through the joint efforts of the defendants and class counsel to persuade the court to approve their settlement agreement and fees. In order for appellate courts to be able to detect and guard against such mischief, the district court must provide its reasoning and hence an adequate basis for review of its discretion.

An effective appellate process is thus part and parcel of the essential procedural protections afforded to unnamed class members. The appeals process "induc[es] trial court judges to make fewer errors because of their fear of reversal." Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. Legal Stud. 379, 408-11, 425-26 (1995). The available data indicates that fairness hearings in district courts tend to be exceedingly brief and generally do not result in changes to settlements crafted by the named parties. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 Colum. L. Rev. 1343, 1348 & n.14 (1995)

(empirical evidence suggests that "courts have little ability or incentive to resist [proposed] settlements"; data shows median hearing lengths in two districts of 38 and 40 minutes); Federal Judicial Center, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS 58 (1996) ("Approximately 90% or more of the proposed [class] settlements were approved without changes in each of the four districts."). Fairness hearings in some courts are "typically pep rallies jointly orchestrated by plaintiffs' counsel and defense counsel" in which the district courts "engage in paeans of praise for counsel or lambaste anyone rash enough to object to the settlement." Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action & Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 46-47 (1991). The requirement that a district court explain itself sufficiently for appellate review acts as an important check on the tendency of a district court just to go along with the program once the primary litigants lay down their arms.

Finally, in addition to the basic importance of this issue to class action litigation, it is also especially appropriate that this Court resolve the matter because much of the current confusion stems from nearly 35-year-old *dicta* in this Court's *Protective Committee* decision, and hence those courts following that language likely will not budge absent further word from this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

N. PETER KNOLL
815 Emery Street
Longmont, CO 80501
(303) 774-8013

Counsel for Petitioners

Dated: June 10, 2002.

APPENDICES

APPENDIX A

-- F.3d --, 2002 WL 1063956

**United States Court of Appeals,
Eighth Circuit.**

In re: US BANCORP LITIGATION, also known as U.S. Bank National Association Litigation

James D. KOENIG, on behalf of himself, and the class of similarly situated consumers; Phillippa Saunders, on behalf of herself and others similarly situated; Barbara A. Mans; Michael J. Mans, individually, and on behalf of a class of all others similarly situated; Chris Somers, individually, and on behalf of a class of all others similarly situated; Anne Bergman; Kathryn Rosebear, on their own behalf and on behalf of all others similarly situated; Jane Korn; Robert Madoff, on their own behalf and on behalf of all others similarly situated; Brent Johnson; Bill Rooney, individually, and on behalf of a class of all others similarly situated; Daniel P. Mallove; Timothy Gaillard; Cynthia Gaillard; Mary Scalise, Plaintiffs--Appellees,

N. Peter KNOLL, Intervenor Plaintiff-Appellant, Anne KNOLL, Intervenor Plaintiff, William J. LORENCE, Intervenor Plaintiff--Appellant,

v.

U.S. BANK NATIONAL ASSOCIATION, ND, formerly known as First Bank of South Dakota, N.A.; US Bancorp Insurance Services, Inc.; US Bancorp, formerly known as First Bank Systems, Defendants--Appellees.

William J. LORENCE; David R. Jansen, Intervenors Plaintiffs--Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION, ND, formerly

known as First Bank of South Dakota, N.A.; US Bancorp Insurance Services, Inc.; US Bancorp, formerly known as First Bank Systems, Defendants--Appellees.

No. 01-1217, 01-1242.

Submitted: Dec. 7, 2001.
Filed: Jan. 15, 2002 (Corrected 1/25/02)..

Appeals from the United States District Court for the District of Minnesota.

Before McMILLIAN, MORRIS SHEPPARD ARNOLD, and BYE, Circuit Judges.

MCMILLIAN, Circuit J.

In these consolidated appeals, Peter Knoll, David Jansen, and William Lorence appeal from the final judgment entered in the District Court[1] for the District of Minnesota, approving a stipulated settlement agreement in a class action suit over their objections. Knoll, Jansen, and Lorence were unnamed class members who intervened after the settlement agreement had been approved. For reversal, they argue the district court judge should have disqualified himself because he had a financial interest in the litigation, the district court violated due process by giving class members only nine days to review attorneys' fee applications, and the district court erred in approving the settlement agreement and the fee award without stating its reasons on the record, and in determining the amount of the fee award. They also object to the costs award for class counsel and the incentive award for the representative plaintiffs. For the reasons discussed below, we affirm the judgment of the district court.

---

[1] The Honorable Jonathan G. Lebedoff, United States Magistrate Judge for the District of Minnesota, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

In June 1999, five named plaintiffs (the "class-action plaintiffs") brought the instant class action on behalf of a national class, seeking injunctive relief and damages because defendant U.S. Bank National (the "Bank") supplied confidential customer account information to unaffiliated third parties for marketing purposes. The class-action plaintiffs and the Bank entered into a stipulated settlement which provided as follows. The Bank would pay to a settlement fund $3 million, plus an amount equal to $2 million less than the amount the Bank paid in respect to a product-refund plan negotiated in a related case. (The parties reveal on appeal that the Bank paid more than $2 million in product refunds and thus this "pourover" provision did not apply.) The settlement fund would be used to pay class counsel up to $1,250,000 in fees and $40,000 in expenses; the Bank would provide funds for this purpose in the amount of 25% of the amount the Bank paid under the product-refund plan. The settlement fund also would be used to pay the class-action plaintiffs $2,000 each.

The class-action plaintiffs noted that, although over four million class members had received settlement notices, only a small fraction of the class-- 0.9%--had raised objections. Specifically, Knoll, Jansen, and Lorence filed written objections and testified at the settlement fairness hearing. Knoll contended the settlement should be rejected because most class members would receive no compensation, the proposed fee award was excessive and unconscionable, its plan for distributing compensation was complicated and expensive, and the maximum amount of compensation was too low. Jansen argued the attorneys' fees were incommensurate to the victims' damages. Lorence claimed he had incurred over $4,000 in costs to change his banking relationships and to close numerous accounts. (Lorence's injuries were related to a former Bank employee's theft of Lorence's private files.)

After making all of the necessary determinations regarding the certification of the class and the class representatives, the district court approved the settlement as fair, reasonable,

adequate, and in the class's best interest, and rejected the objectors' comments as insufficient to call into question the settlement's fairness and adequacy. The court also found the attorneys' fees and costs award to be fair and reasonable. Knoll, Jansen, and Lorence each intervened, and then appealed.

We initially find that the intervenors have standing to challenge the settlement award. *See Croyden Assocs.* v. *Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992) (unnamed class members must intervene to challenge adequacy of settlement on appeal), *cert. denied,* 507 U.S. 908 (1993). We reject their arguments as meritless, however.

We need not revisit the intervenors' disqualification argument, as it was the subject of an earlier unsuccessful motion for limited remand filed by Knoll. In any event, the intervenors concede that they failed to raise the disqualification argument in the district court. *See Alexander* v. *Pathfinder, Inc.*, 189 F.3d 735, 742 (8th Cir. 1999) (this court does not consider new arguments on appeal).

We find due process was satisfied. All objectors had an opportunity to be heard at the settlement hearing, and the intervenors raised their objections to the fee amount both at the hearing and in writing. *See Goldberg v. Kelly,* 397 U.S. 254, 267 (1970) (fundamental requisite of due process of law is opportunity to be heard); *DeBoer* v. *Mellon Mortgage Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995) (*DeBoer*) (due process satisfied where class members received notice of settlement proposal and were able to argue their objections to district court), *cert. denied,* 517 U.S. 1156 (1996).

We also find the district court adequately stated its reasons for approving the settlement agreement and the fee award by stating on the record that the agreement was fair and reasonable and by rejecting the objectors' arguments. Besides, the intervenors have not shown the record establishes that the agreement was unfair. *See DeBoer,* 64 F.3d at 1177 (in absence of specific findings regarding fairness of settle-

ment, this court assumes district court did not abuse its discretion unless record establishes to contrary).

As to the fee award, class counsel explained that the requested fee would be 25% of the total settlement value if an additional $2 million pourover amount was paid into the fund, or 36% of the guaranteed $3.5 million fund amount. Because the pourover amount was not paid into the fund, the $1.25 million fee award represents approximately 36% of the settlement fund. We have approved the percentage-of-recovery methodology to evaluate attorneys' fees in a common-fund settlement such as this, *see Petrovic* v. *Amoco Oil Co.*, 200 F.3d 1140, 1157 (8th Cir. 1999), and we find no abuse of discretion in the district court's awarding 36% to class counsel who obtained significant monetary relief on behalf of the class, *see id.* at 1156 (district court's decisions regarding attorneys' fees in class action settlement will generally be set aside only upon showing of abuse of discretion; to recover fees from common fund, attorneys must demonstrate that their services were of some benefit to fund or enhanced adversarial process).

As to the costs and incentive awards, we find the $40,000 cost award to class counsel for their out-of-pocket expenses was appropriate, *see Keslar* v. *Bartu,* 201 F.3d 1016, 1017 (8th Cir. 2000) (per curiam) (finding no abuse of discretion in $17,000 cost award when case settled for $70,000), and that the $2,000 awarded to the five representative plaintiffs also was appropriate, *see Cook* v. *Niedert,* 142 F.3d 1004, 1016 (7th Cir. 1998) (relevant factors in deciding whether incentive award to named plaintiff is warranted include actions plaintiff took to protect class's interests, degree to which class has benefited from those actions, and amount of time and effort plaintiff expended in pursuing litigation).

Accordingly, we affirm.

APPENDIX B

FILED JUL 05 2000
FRANCIS E. DOSAL, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Master File No. 99-891 (JRT/JGL)

IN RE U.S. BANCORP LITIGATION

PRELIMINARY ORDER IN CONNECTION WITH SETTLEMENT PROCEEDINGS

WHEREAS, on June 15, 2000, the parties to the above-entitled class action litigation entered into a Stipulation of Settlement (the "Stipulation") which is subject to review under Rule 23 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") and which, together with the exhibits thereto, sets forth the terms and conditions for the proposed settlement of the claims alleged in the Consolidated Class Action Complaint (the "Complaint") in this Action on the merits and with prejudice upon the terms and conditions set forth in the Stipulation; and the Court having read and considered the Stipulation and the accompanying documents; and the parties to the Stipulation having consented to the entry of this Order; and all capitalized terms used herein having the meaning defined in the Stipulation;

NOW, THEREFORE, IT IS HEREBY ORDERED, this 5 day of July, 2000, that:

1. The terms and conditions of the Stipulation are preliminarily approved.

2. Pursuant to Fed. R. Civ. P. 23(b)(3), and for the purposes of the proposed settlement only, this action is hereby preliminarily certified as a class action on behalf of the following defined class:

> All customers of any defendant whose account information was supplied to unaffiliated third parties in connection with the marketing of products or services.

3. The Court preliminarily finds, for the purposes of the proposed Settlement and as conditioned as set out in Paragraph 5 of the Stipulation, that the prerequisites to a class action under Fed. R. Civ. P. 23(a) have been satisfied in that: (a) the number of Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Class; (c) the claims of the named representatives are typical of the claims of the Class they seek to represent; (d) the plaintiffs will fairly and adequately represent the interests of the Class; (e) the questions of law and fact common to the members of the Class predominate over any questions affecting only individual members of the Class; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. Pursuant to Fed. R. Civ. P. 23, and for the purposes of the proposed Settlement, plaintiffs Jane Korn, Phillippa Saunders, Chris Somers, Anne Bergman and Kathryn Rosebear are certified as Class Representatives.

5. A hearing (the "Settlement Fairness Hearing") pursuant to Fed. R. Civ. P. 23(e) is hereby scheduled to be held before the Court on December 1, 2000, at 9:00 a.m. for the following purposes:

a. to determine whether the proposed Settlement is fair, reasonable, adequate and in the best interests of the Class and should be approved by the Court;

b. to determine whether the Order and Final Judgment as provided under the Stipulation should be entered, dismiss-

ing the Complaint filed herein, on the merits and with prejudice, and to determine whether the release by the Class to the Released Parties, as set forth in the Stipulation, should be provided to the Released Parties;

c. to consider Plaintiffs' Counsel's application for an award of Attorneys' Fees and Expenses; and

d. to rule upon such other matters as the Court may deem appropriate.

6. The Court reserves the right to approve the Settlement with or without modification and with or without further notice of any kind. The Court further reserves the right to enter its Order and Final Judgment approving the Stipulation and dismissing the Complaint on the merits and with prejudice regardless of whether it has approved or awarded attorneys' fees and expenses.

7. The Court approves the form, substance and requirements of the Notice of Pendency of Class Action, Proposed Settlement Thereof, Settlement Hearing and Right to Share in Settlement Fund (the "Class Notice"), and the Proof of Claim form annexed to the Stipulation of Settlement.

8. Defendants shall cause the Class Notice to be mailed, by first class mail, postage prepaid, on or before September 1, 2000, to all Class Members who can be identified with reasonable effort.

9. The form and method set forth herein of notifying the Class of the Settlement and its terms and conditions meet the requirements of Fed. R. Civ. P. 23 and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled thereto.

10. In order to be entitled to participate in the Net Settlement Fund, in the event the Settlement is effected in accordance with the terms and conditions thereof, each Class Member shall take the following actions and be subject to the following conditions:

a. A properly executed Proof of Claim (the "Proof of Claim") must be submitted by pre-paid first class mail to the Post Office Box address indicated in the Class Notice, no later than December 31, 2000. Such deadline may be further extended by Court Order. Each Proof of Claim shall be deemed to have been filed when postmarked (if properly addressed and mailed by first class mail, postage prepaid) provided such Proof of Claim is actually received prior to the order of the Court approving distribution of the Net Settlement Fund. Any Proof of Claim submitted in any other manner shall be deemed to have been filed when it was actually received at the address designated in the Class Notice.

b. The Proof of Claim filed by each Class Member must be properly filled out, signed and filed in a timely manner in accordance with the provisions of the preceding subparagraph and must provide substantially all requested information.

c. As part of the Proof of Claim, each Class Member shall submit to the jurisdiction of the Court with respect to the claim submitted, and shall (subject to effectuation of the Settlement) release all claims as provided in the Stipulation.

11. Any putative Class Member who wishes to be excluded from the Class may request exclusion by submitting a written notice requesting exclusion from the Class. The written request should show the Class Member's name, address and Social Security or Taxpayer Identification Number. To be effective, the written request for exclusion must be signed by the U.S. Bank customer or his, her or its legal representative, and must be mailed, postage prepaid, or on before October 15, 2000 to the address specified in the Notice.

12. Class Members requesting exclusion from the Class shall not be entitled to receive any payment out of the Net Settlement Fund as described in the Stipulation and Class Notice.

13. The Court will consider objections to the Settlement or the request for attorneys' fees and reimbursement of expenses only if such objections and any supporting papers are filed in writing with the Clerk of the Court, United States District Court, 300 South Fourth Street, Minneapolis, Minnesota 55415, and copies of all such papers are served, on or before November 10, 2000, in accordance with instructions in the revised notice. Attendance at the hearing is not necessary; however, persons wishing to be heard orally in opposition to the approval of the Settlement are required to indicate in their written objection their intention to appear at the hearing.

14. Pending final determination of whether the Settlement should be approved, the Plaintiffs, all Class Members, and each of them, and anyone who acts or purports to act on their behalf, shall not institute, commence or prosecute any action which asserts Released Claims against any Released Party.

15. If: (a) the Settlement is terminated by Defendants pursuant to paragraph D1 of the Stipulation; (b) any specified condition to the Settlement set forth in the Stipulation is not satisfied and the satisfaction of such condition is not waived in writing by Plaintiffs' Lead Counsel and Counsel for the Defendants; (c) the Court rejects the Stipulation, including any amendment thereto approved by Plaintiffs' Lead Counsel and Counsel for the Defendants; or (d) the Court approves the Stipulation, including any amendment thereto approved by Plaintiffs' Lead Counsel and Counsel for the Defendants, but such approval is reversed on appeal and such reversal becomes final by lapse of time or otherwise, then, in any such event, the Stipulation, including any amendment(s) thereof, and this Preliminary Order shall be null and void, of no further force or effect, and without prejudice to any party, and may not be introduced as evidence or referred to in any actions or proceedings by any person or entity, and each party shall be restored to his, her or its respective position as it existed prior to the execution of the Stipulation.

16. The Court retains exclusive jurisdiction over the action to consider all further matters arising out of or connected with the Settlement.

Dated: July 5, 2000

s/_____
The Honorable Jonathan G. Lebedoff
United States Magistrate Judge

APPENDIX C

FILED DEC 12 2000
FRANCIS E. DOSAL, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Master File No. 99-891 (JGL)

IN RE U.S. BANCORP LITIGATION

ORDER AND FINAL JUDGMENT

A hearing was held before this Court (the "Court") on December 1, 2000, pursuant to the Court's order of July 5, 2000 (the "Preliminary Order") and the oral motion of the parties to determine the fairness and adequacy of the Stipulation of Settlement, dated June 15, 2000, [*sic*] (the "Stipulation"). The Preliminary Order [Appendix C] and Stipulation [Appendix D] are each incorporated herein by reference.

Appearing on behalf of plaintiffs were Karl L. Cambronne of Chestnut & Cambronne, P.A., Phillip Cole of Lommen, Nelson, Cole and Stageberg, and Harvey H. Eckart of Reinhardt & Anderson. Appearing on behalf of the defendants was Richard Solum of Dorsey & Whitney. Also appearing and making oral presentations were objectors William Lorence, David Jansen and Peter Knoll. Prior to the hearing, the Court had received memoranda from the parties and also the affidavit of Karl L. Cambronne which attached the objections of 70 class members and information concerning the requested fees and expenses.

It appears that due notice of said hearing has been given in substantial compliance with the aforesaid Preliminary Order. The Court has heard and considered evidence in support of and in opposition to the proposed compromise and settlement of the Action (as defined in the Stipulation). An opportunity to be heard has been given to all other persons requesting to be heard in accordance with the requirements of the Preliminary Order. The Court determines that notice to the Class (which was preliminarily certified in this Court's Order of July 5, 2000, and defined as: All customers of any defendant whose account information was supplied to unaffiliated third parties in connection with the marketing of products or services) was adequate and sufficient and that the entire matter of the proposed settlement is now appropriately considered by the Court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED this 11 day of December, 2000, that:

This matter involves the settlement of a class action. The Settlement Agreement provides for the payment of net settlement proceeds to U.S. Bank customers who file a proper claim form. U.S. Bank will fund the settlement with a payment of $3.5 million from which the parties propose to pay claimants and various attorney fees and expenses.

The Court has reviewed the Stipulation and all of the objections of the individuals submitting them.

Similarly, the Court, in making its determination, has considered the remarks of the three individuals [*sic*] objectors appearing at the hearing.

The form and manner of notice given to the members of the Class is hereby determined to have been the best notice practicable under the circumstances and to have been given in full compliance with the requirements of due process and of Rule 23 of the Federal Rules of Civil Procedure.

The class [*sic*], as preliminarily certified in this Court's Order of July 5, 2000, is finally certified for purposes of effectuating the settlement.

Each of the provisions of Rule 23 of the Federal Rules of Civil Procedure has been satisfied and the Action has been properly maintained according to the provisions of Rule 23 of the Federal Rules of Civil Procedure. Specifically, this Court finds, solely for purposes of the Settlement of the Action, and as conditioned as set out in Paragraph 5 of the Stipulation, that (a) a class action is a fair and efficient method of adjudication of this controversy, (b) the Class is so numerous that joinder of all members is impracticable, (c) questions of law or fact common to the Class predominate over questions affecting only individual members, (d) the claims of the representative plaintiffs are typical of the claims or defenses of the Class, and (e) the representative plaintiffs fairly and adequately protected the interests of the Class. The Court further finds that (i) the prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the parties opposing the Class or would be as a practical matter dispositive to the other members of the Class not parties to the adjudications, and (ii) defendants have acted on grounds generally applicable to the Class, thereby making appropriate final relief with respect to the Class as a whole.

The Stipulation of Settlement is approved as fair, reasonable, adequate and in the best interests of the Class. The written and oral comments of the objectors were not sufficient to lead the court [*sic*] to conclude that the settlement was not fair and adequate or to cause the Court to reject the settlement.

The Settlement releases all claims, rights, causes of action, suits, matters and issues as specifically defined in the Stipulation. Those release terms are specifically incorporated herein.

Class Counsel are awarded attorneys' fees and reimbursement of expenses in the aggregate amount of $1,250,000 in fees and $40,000 in expenses, which sums the Court finds to be fair and reasonable and shall be paid in accordance with the Stipulation.

From the net settlement fund, the five named plaintiffs in the consolidated action shall each be paid, in addition to what is due to them pursuant to their claim forms, the sum of $2,000.00 each.

Without affecting the finality of this Order and Final Judgment in any way, this Court reserves jurisdiction over all matters relating to the administration and consummation of the Settlement.

Pursuant to Fed. R. Civ. P. 54(b), there being no just reason for delay, judgment shall be entered forthwith.

Dated: December 11, 2000

s/_____
The Honorable Jonathan G. Lebedoff
United States Magistrate Judge

APPENDIX D

FILED JUL 05 2000
FRANCIS E. DOSAL, CLERK

In the United States District Court
For the District of Minnesota

Civ 99-891 (JRT/JGL)

In re U.S. Bank National Association Litigation

STIPULATION OF SETTLEMENT

This Stipulation of Settlement (referred to as the "Stipulation'" [*sic*]), which is subject to the approval of the Court, is made this 30th day of May, 2000, between the Plaintiffs, individually and on behalf of the Class Members as defined below, and Defendants U.S. Bank National Association, U.S. Bank National Association ND, U.S. Bancorp, U.S. Bancorp Insurance Services, Inc. (hereafter "Defendants"), by and through their attorneys of record.

I.
DESCRIPTION OF THE ACTION AND DEFINITIONS

A. The Action

This action is a consolidation of various actions commenced in June and July of 1999, as follows:

James Koenig, et al v. U.S. Bank National Association ND, et al

Anne Bergman, et al v. U.S. Bank National Association ND, et al

Phillippa Saunders, et al v. U.S. Bank National Association ND, et al

Jane Korn, et al v. U.S. Bank National Association NA, et al

Brent Johnson, et al v. U.S. Bank National Association ND, et al

Barbara Mans, et al v. U.S. Bank National Association NA, et al

Chris Somers, et al v. U.S. Bank National Association NA, et al

Timothy Gaillard, et al v. U.S. Bank National Association ND, et al

Mallove [sic], et al v. U.S. Bank National Association ND, et al

Scalise [sic] v. U.S. Bancorp, et al

The above actions were assigned to a single judge, namely the Honorable John R. Tunheim, Judge of [sic] United States District Court for the District of Minnesota. As a result of this Stipulation and to simplify the settlement provided for herein, the parties have agreed that all of the above enumerated actions be and hereby are consolidated into this action entitled "In re U.S. Bank Litigation." (Hereafter, this action and all the above underlying actions, are referred to as the "Action.")

In the Action, the plaintiffs allege that they were checking and/or credit card accountholders of one or more Defendants. They further allege that one or more Defendants supplied information respecting such accounts to various marketers of products, contending that such supply was contrary to Defendants' express and/or implied agreements with such accountholders, was in breach of such accountholders' rights of privacy, and was in violation of various state consumer laws and the Fair Credit Reporting Act. Plaintiffs further make claims in respect to the purchase of products and related charges to their accounts. Plaintiffs also allege that they are acting as representative plaintiffs, representing a class of similarly situated accountholders of one or more of the Defendants, and that the Action may be maintained as a class action. Finally,

Plaintiffs allege that they and the members of the class were injured.

Defendants, which are affiliated companies engaged in the banking, credit card and financial services business, have denied the claims alleged by Plaintiffs, and have asserted various defenses. Further, Defendants have denied Plaintiffs' allegations respecting their ability to pursue the actions as class actions, and have denied that any of Defendants' accountholders have sustained actual injury in connection with any sharing of information with marketers.

B. Definitions

In addition to the other terms defined herein, the following terms have the following meanings:

1. **"Class Member"** means a customer of any Defendant whose account information was supplied to unaffiliated third parties in connection with the marketing of products or services.

2. **"Released Parties"** means all Defendants in the Action, including U.S. Bank National Association, ND, U.S. Bancorp Insurance Services, Inc., U.S. Bancorp, U.S. Bank National Association, and all of their officers, directors, agents, employees, affiliates, parents, subsidiaries, attorneys and insurers.

3. **"Released Third Parties"** means any party other than the Released Parties who (whether or not subject to a presently asserted claim) now or in the future derives under this stipulation [*sic*] as provided below a release to the extent necessary to fully satisfy such third party's indemnity, contribution or any other claim or right over against [*sic*] any Released Party which in any way arises out of or is connected with the Released Claims.

4. **"Released Claims"** means any and all claims for damages or claim of right of any kind (whether in law or equity and whether based on any federal, state or local law, whether or not plead) known, unknown, foreseen or unforeseen, which

were or which could have been brought (or which in any way relate to the occurrences or transactions described) in the Action in [*sic*] behalf of or by any Plaintiff or any Class Member on account of (i) Information Sharing, (ii) any charge or claimed loss or damage in respect to any product or service marketed in connection with any Information Sharing, or (iii) on account of any of the allegations made or which could have been made in any of the complaints in the Action which in any way arise out of such allegations or are in any way related to (i) or (ii) of this paragraph.

5. **"Effective Date"** means the date on which the Court's final order and judgment respecting the settlement reflected in this Stipulation reaches finality. As used in this paragraph, "finality" means the date on which the time for appeal or further appeal or review of the Court's final order and judgment (or any decision on appeal thereof) has expired without any appeal or process for such further review having been taken.

6. **"Court"** means the Honorable John H. Tunheim, Judge of the United States District Court for the District of Minnesota, or the Honorable Magistrate Judge Jonathan Lebedoff, Magistrate Judge of the United States District Court for the District of Minnesota to the extent the parties have consented to said Magistrate Judge presiding over the implementation of the settlement provided for herein.

7. **"Information Sharing"** means any of the Released Parties supplying of any information respecting any Plaintiffs or Class Members to unaffiliated third parties in connection with the marketing of products or services.

8. **"Product Refund Plan"** means the process as agreed to by Defendants and the Attorney General of Minnesota and Attorneys General of other states by which Defendants will offer credits or refunds to residents of such states who purchased but have not used products marketed in connection with Information Sharing.

II.
THE SETTLEMENT

A. Introduction

As a result of court-ordered settlement conferences, the parties have agreed to settle and compromise all Released Claims as provided for herein, subject to the approval of the Court.

B. Benefits of the Settlement to the Class Members

Plaintiffs and their counsel have achieved a settlement as evidenced by this Stipulation which will be beneficial to Class Members. Plaintiffs and their counsel considered the expense and length of time necessary to prosecute this litigation through trial and any subsequent appeals, the uncertainties and obstacles to certifying a class and prevailing at trial against Defendants and proving damages in this complex litigation, as well as the substantial benefit provided to the Class by the settlement.

C. Substantive Terms of the Settlement - The Settlement Fund

1. On the Effective Date, Defendants will pay $3 million to a fund against which Class Members may apply for payments as provided in this Stipulation. (hereafter "Settlement Fund") The Settlement Fund will be held in and distributed from a segregated account at U.S. Bank National Association, as provided in the Plan of Notice and Claims Processing and Distribution exhibited hereto as Exhibit 1, and as provided in the Court's final order and judgment.

2. Defendants, in addition to the $3 million payment provided in paragraph 1 above, shall pay to the Settlement Fund an amount equal to $2 million less the amount Defendants pay in respect to the Product Refund Plan. While the implementation of the Product Refund Plan is a condition to the making of any payments from the Settlement Fund as provided by this Stipulation, it is not a condition to the effective-

ness of the settlement provided for herein. Notwithstanding anything contained in this paragraph, it is agreed that the terms of this paragraph and any provision respecting the "pourover" provided for herein shall be null and void in the event that, by August 1, 2000, the Defendants have not been the subject of a consent judgment providing for such Product Refund Plan. In such event, it is agreed that the Defendants, as a full and complete satisfaction of any obligation in respect to such "pourover", shall pay to the Settlement Fund an additional $500,000 as a source of attorneys fees associated with the unrebuttable assumption that $2 million will deemed to have been paid in respect to such Product Refund Plan.

3. Except as provided below, Defendants shall be responsible for the costs associated with the notice, mailing and claims processing in respect to this Stipulation and Exhibit 1.

4. The Settlement Fund (inclusive of any amounts provided in respect to paragraph 2 above) shall be used for (i) distributions to Class Members who make claims of damage from Information Sharing, (ii) for payments of costs incurred in respect to the notice and claims processing, (iii) for payments for attorneys fees and expenses of plaintiffs' counsel and plaintiffs as approved and ordered by the Court, and (iv) other payments resulting from overfunding as provided in Exhibit 1.

D. Other Terms of the Settlement

1. Opt-Outs: In the event that more than 5,000 of the Class Members elect to opt-out of the Action, Defendants shall have the option of terminating this Stipulation and avoiding all obligations in respect to such Stipulation, its Exhibits and the subject settlement. To exercise such option, Defendants must provide written notice of such election to plaintiffs' counsel Karl Cambronne and Phil Cole within 30 days from the last date set by the Court by which time any opt-out elections must be submitted. Upon the delivery of such notice, all of the agreements and provisions of this

Stipulation and the exhibits hereto, any other settlement understandings or negotiations, and any related findings, shall become void and of no effect, and the parties shall thereupon be restored to their status as of the date of this Stipulation, without prejudice to any party with respect to all claims, defenses and the like. Thereafter, nothing contained in this Stipulation, nor any of the negotiations, writings, conversations, findings or orders incident thereto, shall be used by any person in any proceeding.

2. Release: The Plaintiffs and Class Members intend to extend to the Released Parties a full and final satisfaction, conclusion and release of any and all Released Claims. As of the Effective Date, the Plaintiffs and Class Members do so release and fully and forever release and discharge all of the Released Parties in respect to any and all Released Claims.

In addition, the Plaintiffs and Class Members, in connection with any and all such Released Claims, release and forever discharge any and all Released Third Parties who (whether or not subject to a presently asserted claim) now or in the future possess or claim to possess any right (based on whatever theory in law or equity and whether based on federal, state or local law) of contribution, indemnity or any other right to recover from any Released Party all or part of any damages that may now or in the future be due from the Released Third Parties to any Plaintiffs and/or Class Members (collectively referred to as "Claims Over") which damages arise out of or are connected to the Released Claims. The release extended to the Released Third Parties is not necessarily a total release of such parties, but is co-extensive with the liability such Released Third Parties may have to the Plaintiffs and/or Class Members that is the subject of any Claims Over. To the extent that any non-settling party now or in the future possesses any right of indemnity, contribution or other right to recover from any Released Parties for a liability arising out of or connected with the Released Claims, such non-settling

party is a Released Third Party and is fully released to the extent of such liability.

It is the intention of Plaintiffs and Class Members that this release of Released Third Parties will vest the Released Parties fully with a summary defense of release against any Claims Over to the full extent necessary to sustain such summary defense and any related dismissal of any Released Parties. Plaintiffs and Class Members agree to and hereby stipulate for use in any court where a Released Third Party files any Claims Over against any Released Party that such Released Third Party possesses no liability to the Plaintiffs and/or Class Members to the full extent necessary to sustain such Released Party's summary defense of release and any related dismissal of any Released Parties.

3. Limitations on Future Class Action Representations: Plaintiffs and Class Members agree as additional consideration for the payments made hereunder that in the event any of them act as a proposed class representative in a putative class action against any Released Third Parties where the claims, in whole or in part, arise out of the Released Claims, such Plaintiff or Class Member shall define the class membership to exclude all persons who opt out of this action [*sic*].

4. Preliminary Hearing and Approval and Notice: The parties shall mutually cooperate to request a hearing for preliminary approval of this Stipulation to be held before the Court as soon as practicable, and to seek from the Court an Order in the form attached hereto as Exhibit 1A [not reprinted below because no such exhibit was actually filed], which Order shall preliminarily approve the settlement and provide for notice to Class Members of class action, settlement of class action, rights to opt-out and a hearing on the settlement and its fairness, attorneys fees, and such other matters as the Court deems appropriate (hereafter "Notice") in the form attached hereto as Exhibit 1B.

5. Class Certification: The parties hereto agree that at the final hearing on this settlement, the Court may make findings respecting class certification which, absent the existence of this settlement, would be contested. The parties agree that the settlement contemplated by this Stipulation provides for Defendants' agreements as to measures of recoveries and means of assessing such recoveries, agreements which are fully dependent upon the parties' agreements, and further agree that such settlement provides for Defendants' waiver of certain legal objections to class certification which Defendants would claim but for their agreement to settle the Released Claims. Accordingly, while the agreements provided for by this stipulation and other circumstances may give rise to findings that a class may be certified in accordance with the requirements of the Rules of Civil Procedure, any such finding is for settlement purposes only. In the event that, for any reason, this Stipulation and related settlement is not fully consummated and in place as of the Effective Date, and any such agreements thereby become void, then all of the agreements, stipulations, orders or findings respecting certification shall be null and of no effect, there shall be no use of any such agreements, stipulations, orders or findings, and all of the parties shall have preserved to them any and all claims or oppositions respecting class certification as existed absent such agreements, stipulations, orders or findings as such claims or oppositions existed prior to this Stipulation.

6. Final Judgment of Dismissal: The parties shall seek, at the hearing on the Settlement, a Final Judgment of Dismissal with Prejudice of the Released Claims substantially in the form of Exhibit 2 attached hereto.[1] Such judgment shall be final, binding, and with prejudice as to the Settled Claims, and shall be preclusive of any further litigation of such claims

---

[1] [No such exhibit was attached to the filed Stipulation, and hence it is not reproduced herein.]

by any party other than those, if any, who opt-out of the Action.

7. Events of Non-Approval: If the Court for whatever reason does not enter the order preliminarily approving the settlement and approving the form and manner of Notice or does not enter the Final Judgment of Dismissal with Prejudice substantially consistent with this Stipulation and its exhibits, or if the Court enters such a Final Judgment of Dismissal and appellate review is sought, and upon such review, such Final Judgment is reversed or is modified so as to materially change any of the terms of this Stipulation, then this Stipulation shall be terminated and of no effect. (No order of the Court or an appellate court in respect to the amount of attorneys fees or expenses shall be deemed such a reversal or modification.) In the event this Stipulation is so terminated or fails to become effective for any reason, then the parties to this Stipulation shall be restored to their status as of the date immediately prior to the execution of this Stipulation, and they shall proceed in all respects as if this Stipulation and related findings, orders or judgments had not been executed or entered, and shall file a stipulated motion to schedule further pretrial proceedings and trial as appropriate to the conclusion of the Action. Further, in such event, this Stipulation shall be void and has no continuing effect, and no reference to the fact of a proposed settlement or the related terms or negotiations, nor to any findings, orders or judgments incident hereto, shall be made in any court nor sought to be used by any person in any proceeding.

III. MISCELLANEOUS

A. Modification: This Stipulation may be amended or modified only by written instrument signed by all parties or their counsel.

B. Integration: This Stipulation and its Exhibits and Appendices constitute the entire agreement among these parties, and no representations, warranties or inducements have

been made to any party concerning this Stipulation or its Exhibits and Appendices other than the representations, warranties and covenants contained and memorialized in such documents.

C. Drafting: The parties agree that no single party shall be deemed to have drafted this Stipulation or any portion thereof, and that for purposes of construing any ambiguity it is agreed that this Stipulation is the collaborative effort of all attorneys and there will be no construction of an ambiguity against any party on account of any claim that such party drafted the subject language.

D. Authorization: Counsel for all parties are expressly authorized by the parties whom they represent to enter into this Stipulation, to take all appropriate action required or permitted to be taken by such parties pursuant to this Stipulation to effectuate its terms, and to execute any other documents required to effectuate the terms of this Stipulation. The parties and their counsel will cooperate with each other in good faith to effect the implementation of the Stipulation.

E. Successors: This Stipulation shall be binding upon, and inure to the benefit of, the successors and assigns of the parties hereto.

F. Interpretation: All terms of this Stipulation and the Exhibits hereto shall be governed by and interpreted according to the laws of the State of Minnesota.

G. Counterparts: This Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument provided that counsel for the parties to this Stipulation shall exchange among themselves original signed counterparts.

H. Cooperation: The parties shall cooperate in presenting papers, affidavits, and/or testimony to the Court as may be necessary to effectuate the purposes and intent of this Stipulation.

I. Fair and Reasonable: The parties believe that this Stipulation is fair and reasonable and have arrived at this Stipulation in arm's-length negotiations with the help of the Court.

J. Continuing Jurisdiction: The Court shall retain continuing jurisdiction over this litigation until the Settlement [*sic*] and all transactions contemplated herein are completed.

Dated: June 15, 2000

CHESTNUT & CAMBRONNE, P.A.

By: s/_____
Karl L. Cambronne, #14321
3700 Piper Jaffray Tower
222 South Ninth Street
Minneapolis, MN 55402
(612) 339-7300

REINHARDT & ANDERSON

By: s/_____
Mark Reinhardt, #90530
Harvey Eckart, #215879
Garrett Blanchfield, Jr., #209855
E-1000 First Bank Building
332 Minnesota Street
St. Paul, MN 55101
(651) 227-9990

MANSFIELD, TANICK & COHEN, P.A.

By: s/_____
Seymour Mansfield, #67271
Richard Fuller, #32669
V. John Ella, #24982

1560 International Centre
900 Second Avenue South
Minneapolis, MN 55402-3383
(612) 339-4295

ZIMMERMAN & REED
Charles S. Zimmerman, #120054
Keelyn Friesen, #246736
Jennifer Sustacek, #251598
901 Third Street North, Suite 100
Minneapolis, MN 55401-4123
(612) 341-0400

CHARLES H. JOHNSON & ASSOC.
Charles Johnson
2599 Mississippi Street
St. Paul, MN 55112
(651) 633-5685

HUNEGS STONE KOENIG LENEAVE & KVAS
William Kvas
1650 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 339-4511

WOLF POPPER ROSS, L.L.P.
Peter Safirstein
845 Third Avenue, 12th Floor
New York, NY 10022
(212) 451-9626

LOMMEN NELSON COLE & STAGEBERG, P.A.
Phillip Cole
1800 IDS Center

80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

YOUNGDAHL & SADIN, P.C.
Joseph Arshawsky
9621 Fourth Street NW
Albuquerque, NM 87114
(505) 792-8500

BUCKNELL STEHLIK SATO & STUBNER, LLP
Thomas N. Bucknell
2003 Western Avenue, Suite 400
Seattle, WA 98121
(206) 587-0144

Scalise Counsel? [*sic*]

DORSEY & WHITNEY LLP

By s/_____
Richard B. Solum
Pillsbury Center South
Minneapolis, Minnesota 55401
Attorneys for Defendants

Exhibit 1

PLAN OF NOTICE, CLAIMS PROCESSING AND DISTRIBUTION

The following is the plan for notice and claims processing in respect to the settlement described in that certain Stipulation of Settlement dated June , 2000 (hereafter "Stipulation") and subject to the approval and/or modification of the Court. The terms herein shall have the same definitions as provided by the Stipulation.

1. Notice to Class Members: As soon as practicable after the order (in the form of Exhibit 1A hereto [not reprinted below because no such exhibit was actually filed]) preliminarily approving the Stipulation and the implementation of the Product Refund Plan, Defendants shall provide to Class Members the Notice of Class Action, Settlement and Opt Out Rights and Hearing on the Settlement in the form provided by Exhibit 1B hereto, and the Claim Form, in the forms of Exhibits 1C & 1D hereto (hereafter collectively "the Notice"), as approved and ordered by the Court. The method by which the Notice is provided to Class Members shall be at the election of Defendants, may be by way of inclusion in monthly statements provided by any Defendant to one or more Class Members, and in any event will satisfy the requirements of due process and of Rule 23, as determined by the Court. The costs incurred in respect to the printing and provision of the Notice shall be paid by Defendants, subject to reimbursement from the Settlement Fund as provided herein.

2. Opt-Out and Claims Submissions: Class Members shall have 90 days from the date of the Notice to make an election to opt-out, and shall have 120 days from the date of the Notice to submit, as warranted, their Claim Form (Exhibit 1C and 1D hereto) to a neutral Claims Administrator who will be responsible for administering the terms of the Stipulation

of Settlement and this Plan, and any Court orders in respect hereto. Such Claims Administrator shall be chosen at the mutual agreement of the parties and approved by the Court, and the fees and expenses of such Claims Administrator shall be paid by Defendants, subject to reimbursement from the Settlement Fund as provided herein.

3. Payment Scoring: The Claim Forms shall be received by the Claims Administrator and scored for payment (either manually or electronically) as follows:

a. Item 1 (checking account information shared): $50

b. Item 1 (checking account information not shared): $25

c. Item 2 (non-checking accounts/checking accounts): $50/$100

d. Item 3 (non-checking accounts/checking accounts): $100/$200

e. Item 4 (non-checking accounts/checking accounts): $100/$200

f. Item 5 (non-checking accounts/checking accounts): $150/$300

g. Item 6 (non-checking accounts/checking accounts): $200/$400

In addition, a retired judge chosen at the mutual agreement of the parties and approved by the Court, shall determine the amounts, if any, to be paid to those Class Members submitting claims in respect to Item 7 of the Claim Form, if any, in a range from $0 to $2,000, as legally recognized damages.

4. Overfunded or Underfunded Settlement Fund: In the event the Settlement Fund is overfunded (there being more money in the Settlement Fund than necessary to accommodate the payments provided for by paragraph 5 below), the Claims Administrator shall, to the extent necessary to minimize such overfunding, increase the payment scores

by increasing the Item 1 scores to amounts not to exceed $150 (checking account information shared) and $75 (checking account information not shared), and by adjusting upward the Item 2 through 6 (but not item [*sic*] 7) scores by the same ratable percentage to amounts not to exceed the following:

> Item 2 (non-checking accounts/checking accounts): $150/$300
>
> Item 3 (non-checking accounts/checking accounts): $200/$400
>
> Item 4 (non-checking accounts/checking accounts): $200/$400
>
> Item 5 (non-checking accounts/checking accounts): $250/$500
>
> Item 6 (non-checking accounts/checking accounts): $300/$600

In the event the Settlement Fund thereafter remains overfunded, the overfund (the amount by which the Settlement Fund exceeds the amount necessary to accommodate the payments provided for by paragraph 5 below and as adjusted by this paragraph (4) [*sic*], shall be distributed as follows:

> a. to U.S. Bank National Association for reimbursement of any otherwise not reimbursed Administration Costs (as defined below), up to $400,000; then
>
> b. one-half of any overfund remaining after the reimbursement described in (a) above to the University of Minnesota Law School for the teaching, research or study of laws relating to privacy; and one-half of any such overfund to either (i) regulated non-profit human service agencies in Minnesota, or (ii) U.S. Bank National Association, or a combination of (i) and (ii) as determined by the Court.[2]

---

[2] While plaintiffs [*sic*] and defendants [*sic*] contend respectively that this one-half should, in its entirety, go to human services charities or be re-

In the event the Settlement Fund is underfunded (there being less money in the Settlement Fund than needed to accommodate the payments provided for by paragraph 5 below and as adjusted by this paragraph (4) [*sic*], the Claims Administrator shall decrease the payment scores as necessary to minimize such underfunding, but in no event shall the Claims Administrator do so to the extent any payments would be less than $10. If after such decreases the Settlement Fund remains underfunded, Defendants shall have the option of permitting further decreases in the payment scores so as to eliminate such underfunding, or directing the funds which would otherwise be distributed in respect to the lowest payment score or scores which cannot be funded for a score of at least $10 to some combination of the University of Minnesota Law School or human services agencies as Defendants determine.

5. Funding and Payments: Upon the Effective Date, Defendants shall cause to be deposited into the Settlement Fund, to be held in a demand deposit account at U.S. Bank National Association with signatory powers as ordered by the Court, the amount of $3 million and such other amount (if any) required to be paid to the Settlement Fund by paragraph C(2) of the Stipulation (such total amount referred to herein as the "Settlement Fund"). The Settlement Fund shall be used as follows:

a. To pay Plaintiffs' attorneys their Court-approved fees and expenses, the application for which will not exceed $1,250,000 in fees nor $40,000 in expenses. Defendants shall provide funds for this purpose in the amount of 25% of the amount Defendants pay to claimants in respect to the Product Refund Plan.

---

turned to defendants [*sic*], it is agreed that defendants [*sic*] may make submissions and be heard by the Court as to why this one-half, in its entirety, should be returned to defendants [*sic*]. The Court will determine the issue on the basis of what the Court concludes is fair, reasonable and equitable given all the circumstances.

b. To pay the above-captioned Plaintiffs in the Action compensation in the amount of $2,000 each.

c. To pay Defendants up to $400,000 as reimbursement for any and all costs or expenses, whether out-of-pocket or internal, incurred in respect to the printing or provision of the Notice, the administration of claims, claims processing and distribution (hereafter "Administrative Costs"). Defendants shall not receive reimbursement for those internal costs or expenses which Defendants would have incurred absent this settlement.

d. To pay Class Members such amounts as provided by paragraphs 3 and 4 above.

e. To pay any overfunds in accordance with paragraph 4 above.

The Settlement Fund shall not accrue or earn interest except in the event it is underfunded in respect to the presumptive payment scores provided in paragraph 3 above, in which case Defendants shall pay, to the extent necessary to relieve any such underfunding, interest on the Settlement Fund at the rate of 5% simple interest on balances (other than the $400,000 provided in part (b) of this paragraph 5) held but not distributed from and after the date of funding. In no event will Defendants be obligated to satisfy any underfunding except to the extent of this interest obligation.

Ex 1D [*sic*]
[exhibit order as in original]

CLAIM FORM

IMPORTANT: To qualify for compensation, you must sign, affirming as true, the answer, if any, which is applicable.

1. When I learned of U.S. Bank's sharing of customer information as described in the Notice, I felt that such sharing was not compatible with the relationship between myself as a checking account customer and U.S. Bank.

_____ (sign here if true)

2. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I complained orally to _____ at U.S. Bank. (Provide the name and/or telephone number of the person or department to whom you complained.)

_____
Name and/or Telephone Number to Whom You Complained

_____ (sign here if true)

3. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I complained in writing to U.S. Bank at the following address _____.

_____ (sign here if true)

4. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I complained orally to a consumer or government organization or agency such as the Better Business Bureau, an Attorney General office, the Office of the Comptroller of the Currency or the like. (Provide the name and telephone number of the organization or agency to which you complained.)

_____
Name and Telephone Number of Organization or Agency

_____ (sign here if true)

5. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I complained in writing to a consumer or government organization or agency such as the Better Business Bureau, an Attorney General office, the Office of the Comptroller of the Currency or the like. (Provide a copy of the complaint, or state the substance of the complaint you wrote and identify the name and address of the organization or agency to which you sent the written complaint.)

_____ (sign here if true)

6. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I initiated contact and consulted with a professional (such as a lawyer, doctor, psychologist or the like), whose identity is:

_____

Name and Address of Professional

_____ (sign here if true)

7. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and a result I experienced emotional, economic or other injury beyond that set out in any of the above categories, and would like the retired judge to consider the following description of my injury:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____ (sign here if true)

I realize that by reason of the settlement described in the Notice, I am releasing and forever discharging U.S. Bank National Association, U.S. Bank National Association ND, U.S. Bancorp, U.S. Bancorp Insurance Services, Inc., and any of their affiliates, officers, directors, employees or agents from any and all claims in respect to any Information Sharing or the related sales of products or services as of the date hereof, as more fully described in the discussion of Release in the Notice and in the Stipulation.

Realizing that this application is being submitted in a proceeding before the United States District Court and that the information in this application must be true and correct, under the penalty of perjury, I do here swear that the above statements are true.

_____

Signature of applicant

_____

Signature of any joint owner on any credit card or checking accounts

_____

Street Address

_____

City, State and Zip Code

_____

Home Phone Number (with area code)

_____

Checking Account Number at U.S. Bank

_____

Credit Card Type and Number at U.S. Bank

Ex. 1C

CLAIM FORM

IMPORTANT: To qualify for compensation, you must sign, affirming as true, the answer, if any, which is applicable.

1. I learned of U.S. Bank's sharing of customer information as described in the Notice, and a result I felt emotionally upset as described below. (Description required)

_____.

_____

_____.

_____ (sign here if true)

2. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I complained orally to _____ at U.S. Bank. (Provide the name and/or telephone number of the person or department to whom you complained.)

_____

Name and/or Telephone Number to Whom You Complained

_____ (sign here if true)

3. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I complained in writing to U.S. Bank at the following address

_____.

_____ (sign here if true)

4. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I complained orally to a consumer or government organization or agency such as the Better Business Bureau, an Attorney General office, the Office of the Comptroller of the Currency or the like. (Provide the name and telephone number of the organization or agency to which you complained.)

_____

Name and Telephone Number of Organization or Agency

_____ (sign here if true)

5. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I complained in writing to a consumer or government organization or agency such as the Better Business Bureau, an Attorney General office, the Office of the Comptroller of the Currency or the like. (Provide a copy of the complaint, or state the substance of the complaint you wrote and identify the name and address of the organization or agency to which you sent the written complaint.)

_____ (sign here if true)

6. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and as a result I initiated contact and consulted with a professional (such as a lawyer, doctor, psychologist or the like), whose identity is:

_____

Name and Address of Professional

_____ (sign here if true)

7. During 1999, I learned of U.S. Bank's sharing of customer information as described in the Notice, and a result I experienced emotional, economic or other injury beyond that set out in any of the above categories, and would like the retired judge to consider the following description of my injury:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____ (sign here if true)

I realize that by reason of the settlement described in the Notice, I am releasing and forever discharging U.S. Bank Na-

tional Association, U.S. Bank National Association ND, U.S. Bancorp, U.S. Bancorp Insurance Services, Inc., and any of their affiliates, officers, directors, employees or agents from any and all claims in respect to any Information Sharing or the related sales of products or services as of the date hereof, as more fully described in the discussion of Release in the Notice and in the Stipulation.

Realizing that this application is being submitted in a proceeding before the United States District Court and that the information in this application must be true and correct, under the penalty of perjury, I do here swear that the above statements are true.

_____

Signature of applicant

_____

Signature of any joint owner on any credit card or checking accounts

_____

Street Address

_____

City, State and Zip Code

_____

Home Phone Number (with area code)

_____

Checking Account Number at U.S. Bank

_____

Credit Card Type and Number at U.S. Bank

Ex 1B [*sic*]

In the United States District Court
For the District of Minnesota

Civ 99-891

In re U.S. Bank National Association Litigation

NOTICE OF CLASS ACTION, PROPOSED SETTLEMENT AND SETTLEMENT HEARING

ATTENTION: ALL PERSONS WHO HAVE HAD CERTAIN CREDIT CARD OR CHECKING ACCOUNTS WITH U.S. BANK

This Notice describes a proposed Settlement of a Class Action which, if approved by the Court, may result in a payment to you as a **person** who had a credit card or checking account with U.S. Bank or its affiliates ("U.S. Bank"), and whose account information was shared with third parties in connection with the marketing of products and services. ("Proposed Settlement").

IN ORDER TO PARTICIPATE IN THE PROPOSED SETTLEMENT, IF APPROVED BY THE COURT, YOU MUST FILL OUT AND RETURN THE CLAIM FORM ENCLOSED WITH THE NOTICE BY NO LATER THAN _____.

IMPORTANT: THIS NOTICE IS A SUMMARY OF A MORE DETAILED STIPULATION OF SETTLEMENT AND PLAN ("STIPULATION AND PLAN [*sic*]). THE STIPULATION AND PLAN IS AVAILABLE FOR YOUR REVIEW BY [*sic*] AT THE CLERK OF COURT'S OFFICE, _____, MINNEAPOLIS, MINNESOTA, OR A COPY CAN BE OBTAINED BY SENDING $5.00 TO

CHESTNUT & CAMBRONNE, 3700 PIPER TOWER, MINNEAPOLIS, MINNESOTA, 55402, REFERENCE U.S. BANK LITIGATION.

WHAT IS THIS LAWSUIT ABOUT?

In June of 1999, the Minnesota Attorney General filed a lawsuit against U.S. Bank, alleging that U.S. Bank had provided account information concerning its customers to a marketer in connection with the marketing of non-financial products and services. Because of apparent adverse customer reaction to this common banking practice, U.S. Bank exited the business--being the first major bank it [*sic*] the United States to publicly commit to no longer engaging in such information sharing. About a month later, U.S. Bank resolved the lawsuit with the Minnesota Attorney General by voluntarily agreeing to: (1) pay an amount equal to the total revenue derived from these activities to charities or public bodies; (2) a consent order confirming U.S. Bank's commitment to no longer share information for the marketing of non-financial products; (3) provide disclosure relative to its privacy policy and (4) provide refunds to U.S. Bank's Minnesota customers who purchased but did not use related products or services.

Shortly after the Minnesota Attorney General's lawsuit, a number of class actions with comparable allegations were filed against U.S. Bank, and the Proposed Settlement here is in respect to those actions now consolidated into this single lawsuit. In this lawsuit, the plaintiffs claim that they had checking and/or credit card accounts at U.S. Bank, and that the sharing of account information was contrary to U.S. Bank's express and/or implied agreements with them, was in breach of the customers' rights of privacy, and was in violation of various state or federal laws. U.S. Bank, while acknowledging that account information was shared with certain marketing companies, denied plaintiffs' claims that such sharing resulted in any liability, denied that any customers sustained any actual injury, and denied plaintiffs' ability to pursue the lawsuit as a class action.

Shortly after the class actions were commenced, the United States Magistrate Judge ordered the parties to pursue early settlement negotiations. As a result of these negotiations, the parties entered into a Stipulation of Settlement which details the Proposed Settlement described in this notice [*sic*]. While the Court has not made any final determination on the outcome of the lawsuit or the fairness of the Proposed Settlement, it has preliminarily approved the Proposed Settlement and ordered that this Notice be delivered to Class Members. The purpose of this Notice is to explain the Proposed Settlement and your rights to (1) participate in the Settlement if it is approved by the court, (2) object to the Settlement in writing if you believe it is unfair, or (3) "opt out" of the Settlement altogether.

IF YOU OPT OUT YOU WILL NOT BE ENTITLED TO PARTICIPATE IN ANY BENEFIT OBTAINED THROUGH THIS PROPOSED SETTLEMENT AND WILL NOT BE BOUND BY ANY RELATED FINDINGS OR JUDGMENT.

THE TERMS OF THE PROPOSED SETTLEMENT

Again, the detailed terms of the Proposed Settlement are contained in the Stipulation of Settlement and Plan of Notice, Claims Processing & Distribution (hereafter "Stipulation and Plan"), which is available to Class Members as described above. Only a summary of the terms is provided here.

Information Sharing: The lawsuit and the Proposed Settlement relate to U.S. Bank's sharing information of [*sic*] certain credit card and checking accounts. U.S. Bank, like other large national banks, has engaged in the practice of providing electronic tapes containing account information, under conditions of confidentiality, to various companies offering goods or services in which banks believed customers would have an interest. These companies would electronically "segment" the information on these tapes to produce electronic lists of banks' customers which were thought to have a greater inter-

est in certain products or services, so that only those customers would receive offers. In the Proposed Settlement, this sharing of information respecting any Plaintiffs or Class Members for the marketing of products or services is referred to as Information Sharing.

Settlement Fund: U.S. Bank will fund a Settlement Fund of at least $3 million, and will pay certain costs associated with the notice and administration of the Proposed Settlement. U.S. Bank is also agreeing in connection with settlements being reached with a number of states, to offer credits or refunds to customers in such states who purchased but have not used products marketed in connection with Information Sharing. To the extent U.S. Bank does not pay at least $2 million in respect to this product refund plan, such amount not so paid will become part of the Settlement Fund here. As a consequence, the Settlement Fund here will be between $3 million and $5 million.

Settlement Payments: The Settlement Fund will be used to make cash payments, after the payment of Court approved attorneys fees and certain costs in respect to the administration of the Proposed Settlement, to those Class Members who have sustained damage as a result of Information Sharing and who provide their sworn claim form regarding such damage. The settlement payments, based on the level or nature of the claimed damage, will range between $400 and $25, but could be higher or lower ($600 maximum or $10 minimum) depending upon the number of claims made against the fund. In addition, a retired judge will have discretion to decide extraordinary claims and award from the Settlement Fund payments of greater amounts if legally recoverable. If there are fewer claims than anticipated such that the Settlement Fund is over-funded even after these increases, there could be payments from the Settlement Fund for reimbursement of certain of U.S. Bank's costs in respect to claims administration, to the University of Minnesota for privacy related studies, or as

ordered in the discretion of the Court to charities and/or reversion to U.S. Bank.

Attorneys Fees and Fees to Plaintiffs: The Proposed Settlement provides, subject to Court approval, for the payment of reasonable attorneys fees and costs to the attorneys representing the plaintiffs and the class. Counsel to the Plaintiffs (____ law firms) will be requesting an award of fees in the amount of $1,250,000 and out-of-pocket expenses not to exceed $40,000. The Proposed Settlement also provides, again subject to Court approval, for the payment of a $2,000 fee to the plaintiffs who have commenced the lawsuit in behalf, and who have represented the interests of, the class members [*sic*]. The application for these payments will be filed with the Court and available for review on or before [date 30 days prior to fairness hearing].

Releases: The Proposed Settlement provides that at such time as the settlement is approved by the Court and becomes final, the Plaintiffs and Class Members will give up their right to sue and shall fully release U.S. Bank and all of its affiliates and other persons or parties related to U.S. Bank, from any further liabilities or claims related to Information Sharing, the products or services which Class Members may have acquired in connection with Information Sharing and any other related liabilities or claims. The Plaintiffs and Class Members will also give up their right to sue and shall release any third parties who could have, and to the extent of, any such claims against U.S. Bank and other related persons or parties. The Stipulation and Plan should be consulted as to the detail [*sic*] of these releases.

Opt-Outs: Those persons who are Class Members shall be entitled to the benefits of the Proposed Settlement if they have been damaged by Information Sharing and provide a sworn claim form. Such persons will also be bound by the findings and conditions of the the Proposed Settlement (including the releases) and any related orders and judgments of the Court.. [*sic*] Any person wishing to not be so bound may

elect to opt-out of this class action lawsuit, in which case he or she will not be so bound, but also will not be entitled to any of the benefits of the Proposed Settlement or the lawsuit. See below for instructions to elect to opt-out.

VALUE OF THE PROPOSED SETTLEMENT AND BENEFITS TO THE CLASS MEMBERS

Plaintiffs and their counsel believe that the recoveries provided by this Proposed Settlement are fair and reasonable. In addition to the monetary settlement payments as discussed above, the settlement avoids the risk that Plaintiffs will not succeed in certifying this lawsuit as a class action, and that plaintiffs [*sic*] will not succeed in demonstrating that they or the Class Members have been injured in a way which could lead to legally recoverable damages. As discussed above, both of these claims have been denied by U.S. Bank. In short, Plaintiffs and their counsel believe that the benefits of settling for a substantial cash recovery today outweigh the speculative possibility of a greater recovery in the distant future and the risk of recovering nothing if the claims against U.S. Bank or the claims that the lawsuit can be pursued as a class action are ultimately unsuccessful.

FAIRNESS HEARING

The Court will hold a fairness hearing at _____ to consider: (1) the fairness, adequacy and reasonableness of the Proposed Settlement; and (2) Plaintiffs' petition for an award of attorneys fees and costs, and the plaintiffs' [*sic*] fees. If the Proposed Settlement is not approved, then there will be no distribution of settlement payments and the lawsuit will return to its status as of a [*sic*] time immediately before the Stipulation was agreed upon.

AS A CLASS MEMBER, YOU HAVE FOUR CHOICES:

FIRST, you may choose to participate in the Proposed Settlement.

If you make this choice and believe you are eligible for a Settlement Payment, you must answer the claim form enclosed with this Notice by no later than _____. The claim [*sic*] is a document to be filed in proceedings before a federal court, and must be answered honestly and under oath. If you do not answer the claim form, you will not be entitled to any settlement payment.

SECOND, you may choose to "opt out" of the lawsuit and pursue your individual claim on your own, by mailing a request for exclusion to the Settlement Administrator at _____. If you file such a request, you will be giving up the right to any settlement payment and you may not file a claim. In exchange, however, you will retain the right to pursue remedies on your own. Requests for exclusion must be in writing and mailed to the Settlement Administrator postmarked on or before [a date 20 days before the fairness hearing], and must refer to the name and number of this case shown on the top of this Notice.

THIRD, if you do not opt out (regardless of whether you do or do not make a claim), and believe that the Proposed Settlement or the requested fees and costs are unfair, you may object by submitting a written statement of the reasons for your objections and mailing the statement to:

Karl Cambronne
Chestnut & Cambronne
3700 Piper Tower
Minneapolis, MN 55402
Reference: U.S. Bank Litigation

(Chestnut & Cambronne will circulate any such statement to other counsel and file any such statement with the Court.)

Such statement must be postmarked on or before [date 15 days before the fairness hearing] and must refer to the name and number of the lawsuit shown at the top of the first page of this Notice. You also have the right to appear at the hearing,

and if you submit a written statement of your objection, you have a right to be heard at the hearing.

You may object to the Proposed Settlement and submit a claim form as described above so as to preserve your right to a settlement payment if the Proposed Settlement is approved.

FOURTH, you may do nothing, in which case you will be bound by the findings and conditions (including releases) of the Proposed Settlement, and any orders and judgments of the Court in respect to the Proposed Settlement and/or lawsuit.

HOW CAN I LEARN MORE?

For more information about the Proposed Settlement and the lawsuit, you may review the pleadings, the Stipulation of Settlement and Plan, Plaintiffs' petition for attorneys' fees, costs and plaintiffs [*sic*] fees (which must be filed by [date 30 days prior to the hearing]) and other papers at the Clerk of Court as set out above, or by writing to Karl Cambronne at Chestnut & Cambronne, 3700 Piper Tower, Minneapolis, Minnesota, 55402, Reference U.S. Bank Litigation. Please **do not** address any question about the settlement or the lawsuit to the clerk of the court [*sic*] or to the judge.

Addendum to Stipulation of Settlement

This Addendum to that Stipulation of Settlement dated May 30, 2000, in In re U.S. Bancorp Litigation (hereafter "Stipulation"), is approved by the below counsel as representatives of the parties in the subject Action this 15th day of June, 2000.

Whereas there is an action pending in state court in North Dakota against one or more of the Defendants in respect to a claim that one or more of the Defendants provided customer information to a third party for the purposes [*sic*] of marketing certain insurance products (hereafter "North Dakota Action");

Whereas the plaintiff in the North Dakota Action is represented by counsel other than any of the counsel in the Action, and the North Dakota Action prior hereto has been pursued independent of any of the plaintiffs or their counsel in, or the proceedings of, the Action;

Whereas all but one of the state law claims originally made in the North Dakota Action which were comparable to the state law claims made here been dismissed, the North Dakota trial judge holding that as a matter of law there were no actual injuries and thus no legally compensable damages, leaving in the North Dakota Action only one claim under a particular North Dakota statute which arguably allows for statutory damages even where no actual injuries exist;

Whereas the trial judge in the North Dakota Action has certified, for liability purposes only, a class of North Dakota residents whose information the North Dakota plaintiff alleges was shared by one or more of the Defendants in violation of the subject North Dakota statute, which certification is now on appeal to the North Dakota Supreme Court because, among other things, the North Dakota rules of procedure forbid class action treatment of actions claiming statutory damages;

Whereas the persons claimed to be class members in the North Dakota Action would be within the definition of Class Members in the Action and accordingly counsel for the Defendants in this Action has expressed concerns relative to the notice of settlement in this Action to such persons, relative to notice to the Court presiding over this Action and relative to notice to counsel to the plaintiff in the North Dakota Action;

Whereas it appears that there could be a settlement of the claims of the plaintiff and the North Dakota persons alleged to be in the class in the North Dakota Action such that the confusion, potential jurisdictional conflicts, conflicting notices and claim issues, opt-out processes, objections to the settlement of this Action and the like could be avoided; and

Whereas the parties to this action [*sic*] wish to proceed with the preliminary hearing on the preliminary approval of the settlement of this Action in accordance with the Stipulation while at the same time accommodating the Defendants' ability to settle the North Dakota Action without difficulty associated with issues or conflicts between this Action and the North Dakota Action and without prejudice to the interests of the plaintiffs and their counsel in this Action.

Now therefore, the undersigned stipulate to this Addendum as follows:

1. Defendants may, at their option, direct to such North Dakota residents (or prior residents) as may be Class Members in this Action, a notice in the form of that set out in Exhibit A hereto [not reprinted below because no such exhibit was actually filed], in substitution of the Notice described in the Stipulation and exhibits thereto.

2. Defendants agree to continue settlement negotiations with counsel to the plaintiffs in the North Dakota Action, and the undersigned agree that in respect to any such settlement:

a. Defendants shall use their best efforts to formulate a settlement in which the plaintiff and her counsel in the North Dakota Action make no claim to any of the attorneys fees to be paid to plaintiffs' counsel in this Action, including any fees in respect to any portion of the Settlement Fund in this action [*sic*] which may inure to the benefit of Class Members here who are also members of the alleged class in the North Dakota Action;

b. The implementation of the settlement provided by the Stipulation shall not be delayed on account of such a settlement of the North Dakota Action;

c. Defendants may formulate a settlement of the North Dakota Action and in respect to North Dakota Class Members which is implemented as part of the settlement of this Action by way a subclass in this Action of those persons who are alleged to be members of the class in the North Da-

kota Action, which settlement will be the subject of an agreement between counsel to Defendants and counsel to plaintiff in the North Dakota Action in their sole discretion;

d. To the extent that a settlement of the North Dakota Action is implemented as provided in (c) above, the parties to the Stipulation in this Action agree that the Stipulation will be amended to provide for any such settlement so long as such settlement provides for (a) and (b) above, it being agreed that such settlement will be one in which neither any plaintiff nor plaintiff's counsel in this Action have an interest, one which is to be subject to negotiation between counsel to plaintiff in the North Dakota Action and Defendants exclusively, and one in which any related subclass will be the subject of representation by counsel to the plaintiff in the North Dakota Action exclusively.

Defendants' Counsel

By: s/_____
Richard B. Solum

Plaintiffs [*sic*] Counsel
in the Action

By: s/_____
Karl Cambronne

By: s/_____
Phil Cole

Lead Counsel for Plaintiffs

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1217/01-1242

James D. Koenig, etc., et al., Appellees,	*	
	*	Order Denying
N. Peter Knoll, et al., Appellants,	*	Petition for Rehearing and for Rehearing En Banc
v.	*	
US Bank National Association, ND, etc., et al., Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

March 12, 2002

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-1217/01-1242

James D. Koenig, etc., et al., Appellees,	*	
	*	Appeal from
N. Peter Knoll, et al., Appellants,	*	the United States District Court for the District
	*	
v.	*	of Minnesota
	*	
US Bank National Association, ND, etc., et al., Appellees.	*	

The petition for rehearing by the panel filed by N. Peter Knoll on February 6, 2002, is denied.

(5193-010199)

March 12, 2002

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX G

FILED NOV 22 2000
FRANCIS E. DOSAL, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Master File No. 99-891 (JRT/JGL)

IN RE U.S. BANCORP LITIGATION

AFFIDAVIT OF KARL L. CAMBRONNE

COUNTY OF HENNEPIN)
) ss.
STATE OF MINNESOTA)

COMES NOW, Karl L. Cambronne being first duly sworn states and alleges as follows:

1. I am one of the attorneys representing plaintiffs and one of three court-appointed lead counsel in this litigation. I submit this affidavit in support of the request for approval of the settlement and in support of the petition for attorney fees and costs.

2. All time records of each participating law firm will be made available to the court for review upon request. The fee and expense records of each participating law firm have been the subject of analysis by lead counsel. After analysis, each lawyer has been informed of a proposed payment of fees and what claimed fees have been rejected. It is anticipated that lead counsel will assume responsibility to divide any award

amongst plaintiffs' counsel. If necessary, the matter of division of any awarded fee will be presented to the court for resolution.

3. Attached hereto as Exhibit A is an analysis of the claimed lodestar by participating attorneys as of June 30, 2000 and for some lawyers at later dates.

4. Attached hereto as Exhibit B[1] are true and correct copies of all objections received in this litigation.

5. There are 524 class members who have elected to "opt out" of this litigation.

FURTHER AFFIANT SAITH NOT

Dated: November 22, 2000

By: [s/]_____
Karl L. Cambronne

Subscribed and sworn to before me
this 22nd day of November, 2000

[/s/]_____
Notary Public
[seal] STACEY L. SANDLER
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2005

---

[1] [Not reproduced in this Petition for Certiorari.]

EXHIBIT A

U.S. Bank
Summary of Submitted Attorney Time and Expenses

Firm	Report Date	Hours	Lodestar	Expenses
Reinhardt & Anderson	9/30/00	522.00	$156,554.70	$6,040.79
Wolf Popper	6/23/00	521.20	$174,627.00	$18,641.12
Chestnut & Cambronne	9/30/00	277.80	$107,764.50	$937.06
Charles H. Johnson & Associates	5/31/00	79.25	$21,336.25	$750.00
Mansfield & Tannick	5/31/00	433.40	$141,355.00	$1,483.54
Lommen Nelson	6/15/00	166.30	$51,294.50	$1,143.51
Zimmermann Reed	7/24/00	392.55	$103,205.75	$1,655.54
Youngdahl & Sadin/Hunegs, Stone, Koenig, LeNeave & Kvas	6/26/00	600.25	$170,000.00	$8,460.10

App. G4

Tag Along Cases

Firm	Report Date	Hours	Lodestar	Expenses
Law Offices of Patrick E. Catalano	6/31/00	30.00	$9,000.00	$300.00
Law Office of Corrie Yackiluck (and her related counsel)			$4,000.00	
Bucknell, Stehlik, Sato & Stubner LLP/Stutman, Freigter & Glett	4/17/00	186.50	$62,302.50	$3,223.85
GRAND TOTAL		3,209.25	$1,001,440.20	$42,635.51

Supreme Court U.S.
FILED
JUL 12 2002
OFFICE OF THE CLERK

No. 01-1811

In the
Supreme Court of the United States

DAVID R. JANSEN, WILLIAM J. LORENCE, AND N. PETER KNOLL,

Petitioners,

v.

US BANK NATIONAL ASSOCIATION, ND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Kay Nord Hunt
Counsel of Record
Phillip A. Cole
LOMMEN, NELSON, COLE & STAGEBERG, P.A.
1800 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Plaintiffs James D. Koenig, on behalf of himself and the class of similarly situated consumers, et al., Respondents
[**additional counsel for Respondents listed after conclusion*]

2002 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 6

A. The Record Supports the District Court's Order 6

B. There Is No Conflict In the Courts or With This Court's Holding 7

CONCLUSION 9

TABLE OF AUTHORITIES

Statutes:

N.D. Cent. Code § 6.08.1-03 2

Cases:

Hatch v. U.S. Bank Nat'l Assoc., ND 1, 3
Civ. No. 99-872 (D. Minn. 1999)

Junkert v. First Bank Nat'l Assoc. 2
Civ. No. 98-01577 (N.D. Dist. Ct. File May 27, 1998)

Protective Committee for Independent Stockholders
of TMT Trailer Ferry, Inc. v. Anderson 7
390 U.S. 414 (1967)

In re US Bancorp Litigation 1
99-891 (D. Minn. 1999)

The Respondent James D. Koenig, on behalf of himself and the class of similarly situated consumers, et al. (hereinafter Plaintiffs), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 291 F.3d 1035 (8th Cir. 2002).

STATEMENT OF THE CASE

On June 8, 1999, the Minnesota Attorney General filed suit against U.S. Bank. See Hatch v. U.S. Bank Nat'l Assoc. ND, Civ. No. 99-872 (D. Minn. 1999) (Rosenbaum, J.). Following on the heels of that suit, numerous class actions with essentially identical allegations were filed in June and July of 1999.[1] Of these, seven were filed in the District of Minnesota and the remaining three were filed in California, Washington and Idaho, respectively. Venues in the out-of-state actions (after contested motions in two of the three cases) were transferred. Ten class actions were ultimately consolidated in In re US Bancorp Litigation, Civ. No. 99-891 (D. Minn.

---

[1] These were Koenig v. U.S. Bank Nat'l Assoc. ND, No. 99-891 (D. Minn. 1999); Bergman v. U.S. Bank Nat'l Assoc. ND, No. 99-1038 (D. Minn. 1999); Saunders v. U.S. Bank Nat'l Assoc. ND, No. 99-909 (D. Minn. 1999); Korn v. U.S. Bank Nat'l Assoc. NA, No. 99-893 (D. Minn. 1999); Johnson v. U.S. Bank Nat'l Assoc. ND, No. 99-920 (D. Minn. 1999); Mans v. U.S. Bank Nat'l Assoc. NA, No. 99-921 (D. Minn. 1999); Somers v. U.S. Bank Nat'l Assoc. NA, No. 99-922 (D. Minn. 1999); Gaillard v. U.S. Bank Nat'l Assoc. ND, No. 00-46 (D. Minn. 2000); Mallove v. U.S. Bank Nat'l Assoc. ND, No. 00-665 (D. Minn. 2000); and Scalise v. U.S. Bancorp, No. 00-1197 (D. Minn. 2000).

1999), pursuant to the October 1, 1999 pretrial order no. 1 and are the suits involved in this case.

In each of the ten actions, Plaintiffs alleged that they were checking and/or credit card account holders of U.S. Bank and that U.S. Bank shared information respecting such accounts to outside parties. In response to each of these actions (and the consolidated action), while U.S. Bank admitted the essential facts of information sharing, it denied any liability, wrongdoing or compensable damages and denied that these actions could proceed as class actions.

During the prosecution of these federal actions a class action with similar claims was also pending in the Cass County District Court for the State of North Dakota, see Junkert v. First Bank Nat'l Assoc., Civ. No. 98-01577 (N.D. Dist. Ct. File May 27, 1998). Since both Junkert and these federal actions purported to be on behalf of North Dakota customers who would have been members of the stated class in both cases, both the North Dakota district court and the United States District Court had concurrent jurisdiction over this potential class (or subclass) of North Dakota residents.

Defendants in the North Dakota case moved for partial summary judgment in state court, and succeeded in obtaining a dismissal of five claims similar to those here, leaving a unique North Dakota statutory damage claim under N.D. Cent. Code § 6-08.1-03. Junkert, Civ. No. 98-01577 (Sept. 14, 1999 order). The state district court ruled as a matter of law that there were no legally cognizable damages for four of these claims (conversion, consumer fraud, false advertising and misrepresentation). Id. It also concluded that plaintiffs failed factually to support their invasion of privacy claim, as they were unable to show that it was communicated to the public at large. Id.

During the month following the commencement of the Minnesota Attorney General's lawsuit, and during the pendency of this litigation, U.S. Bank entered into a final judgment for injunctive and consumer relief in settlement of the State of Minnesota's claims. Hatch, Civ. No. 99-872 (June 30, 1999 order). In this judgment, the underlying conduct of the bank was identified, the bank agreed to be enjoined from further similar conduct, the bank forfeited all of its revenue from information sharing (not just profit) and the bank agreed to make product refunds to bank customers who asked for them.

This action differed from the Attorney General's lawsuit in that this action sought monetary damages for individual customers based on electronic information sharing. Because of the resolution of the Attorney General's action shortly after the litigation was commenced, there was no dispute about the Bank's actions, but only what liability could be based on those undisputed actions. Plaintiffs recognized there was a significant risk of no recovery in this case if it went to trial. The legal theories of damages on which the case was based had not been tested before and would have been difficult to prove at trial. The concern was whether Plaintiffs would be certified as a class and would be able to show legally compensable injury. This concern was buttressed by the events in the similar North Dakota class action where the court found no legally compensable damages as a matter of law. Furthermore, certification of the North Dakota class as to the damages was denied.

The district court ordered the parties to confer regarding settlement. Accordingly, after numerous meetings (including two all day meetings ordered by the district court), an agreement was reached. Significant work between the parties' counsel (more than ten Plaintiff law

firms) ensued, and a detailed methodology for the settlement of class claims was agreed upon and documented in the Stipulation of Settlement and Plan of Distribution to be approved by the district court.

The settlement agreement provides that U.S. Bank will pay $3.5 million to a fund against which class members may apply for payments and out of which Plaintiffs' attorneys' fees would be paid. (App. D1.) U.S. Bank was also responsible for the costs associated with notice, mailing and claims processing, which U.S. Bank estimated at $400,000. Thus, the total amount U.S. Bank was or is required to pay as a result of the consolidated class actions approximates $4 million.

On June 5, 2000, U.S. Bank and Plaintiffs executed a Stipulation of Settlement and on July 5 the federal district court preliminarily approved the terms and conditions of the settlement. (App. B1.) On August 15, the district court approved the claim forms and the notice of settlement which were subsequently mailed to class members. Six million claim forms were sent. Claim forms and notices resulted in 9,227 phone calls seeking information and 5,981 web site hits to the dedicated class administration web site. As of the December 1 hearing on motion for final approval of settlement, 81,695 class members had submitted claims and 525 class members had opted out. Only 70 individuals submitted objections, which is less than .001% of the persons in the class and less than 1% of the persons submitting claims.

On December 1, 2000, a settlement hearing was held. The class counsel presented in detail why the class action settlement should be approved. The Petitioners here filed written objections, appeared and were heard. Each objector to the settlement had his or her objection

acknowledged when it was served on class counsel and each objection was filed with the district court. Although not required, class counsel served each objector with a copy of the memorandum in support of the settlement and the request for fees. At the hearing on the motion for final approval of settlement, Petitioners addressed their concerns/objections to the district court.

The district court at that hearing assured the objectors that it would not make any decision without reading each objection in its entirety. The district court even gave one objector, who is one of the Petitioners, more time to submit a supplemental argument before making a decision.

On December 12, 2000, the district court entered its order and final judgment approving the settlement and awarding fees to Plaintiffs' class. (App. C1.) The district court approved the settlement as fair, reasonable, adequate, and in the class' best interest. It rejected the objectors' comments as insufficient to call into question the settlement's fairness and adequacy. The court also found the attorneys' fees and costs award to be fair and reasonable. (Id.)

In early January 2001, Petitioner N. Peter Knoll (a lawyer appearing pro se), Anne Knoll (his mother) and William J. Lorence moved to intervene to file an appeal, which motions were granted. On January 11, Petitioners N. Peter Knoll and Lorence appealed the district court's December 12, 2000 order; intervener Anne Knoll did not appeal. Also on January 11, Petitioner David R. Jansen belatedly moved to intervene and on January 16 the district court granted Petitioner's motion. Petitioner Jansen filed his notice of appeal on January 25.

Although Petitioners argued there was nothing in the record to support the reasonableness of the settlement amount, before the United States Court of Appeals for the Eighth Circuit they did not positively contest or argue that the settlement was in any way inadequate or unfair. The submissions of the parties and results in related cases more than supported its adequacy. The Eighth Circuit found due process was satisfied. (App. A4.) Petitioners had an opportunity to be heard in the settlement hearing and the Petitioners raised their objections both at the hearing and in writing. (Id.) The Eighth Circuit, based on its independent view of the record, found the district court adequately stated its reasons for approving the settlement agreement and the fee award. The Eighth Circuit also concluded that the Petitioners did not show that the agreement was unfair. (App. A4-5.)

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Record Supports the District Court's Order.

The district court and the Eighth Circuit were aware, through the record in this case, of how the relief achieved in this case fit into the total relief achieved in all the cases. The record shows the reasonableness not only of the settlement but also of the attorney fee award, which involved ten cases which were consolidated and therefore ten sets of class counsel. The record shows the considerable risk in bringing these cases and the significant hurdles that existed before the Plaintiffs could claim success. Indeed, in explaining why they seek certiorari Petitioners do not even contend that the settlement was not reasonable. Nor do they contend that the record does not support the district court's order. They only argue that the

district court should do more work by placing additional statements within the order. This case does not present an appropriate case for certiorari.

B. There Is No Conflict In the Courts or With This Court's Holding.

There is no conflict in the courts or with this Court's holding, as Petitioners allege. The role of a court in passing upon the propriety of a settlement is a delicate one. Since the very purpose of a compromise is to avoid the trial of sharply disputed issues and to dispense with wasteful litigation, the courts must not turn the settlement hearing into a trial or a rehearsal of trial. Rather, in the words of this Court, Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968), it must reach "an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated" and "form an educated estimate of the complexity, expense, and likely duration of such litigation . . . and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." As said in Protective Committee, 390 U.S. at 434, "[I]t is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law."

Protective Committee involved the judicial approval of compromises in a Chapter X bankruptcy proceeding where no hearing was held. The district court made no reference to any of the objections having been filed and nowhere in the record was there an explanation offered by the trustee as to its cursory recommendation of the

compromises. The record left the court unable to tell whether the trial court had really evaluated the wisdom of the proposed compromise. Thus, appellate courts have rejected approval of settlements where the trial court acted without sufficient facts concerning the claim or failed to allow objectors to develop on the record facts going to the propriety of the settlement. Neither of those situations exists here.

The district court, as the record shows, was well aware, through the record in this case, of how the relief achieved in this case fit within the total relief achieved in all the cases and that the settlement reached was a good settlement for the class. Here, as the Eighth Circuit points out, the record shows the trial court held hearings, heard the objectors out in writing and in person, and found that their arguments did not change its assessment. Clearly, the Eighth Circuit does require that the district court have shown it made a reasoned judgment about the settlement after hearing opposing views. Accordingly, there is no real conflict among the circuits on the core principle on which this Court insists and there is no reason to review the phrasing of the particular means by which the various circuits implement that principle.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

LOMMEN, NELSON, COLE & STAGEBERG, P.A.
Kay Nord Hunt
Counsel of Record
Phillip A. Cole
1800 IDS Center, 80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

CHESTNUT & CAMBRONNE, P.A.
Karl L. Cambronne, I.D. No. 14321
3700 Piper Jaffray Tower
222 South Ninth Street
Minneapolis, MN 55402
(612) 339-7300

REINHARDT & ANDERSON
Mark Reinhardt, I.D. No. 90530
Harvey H. Eckart, I.D. No. 215879
Garrett D. Blanchfield, Jr., I.D. No. 209855
E-1000 First National Bank Building
332 Minnesota Street
St. Paul, MN 55101
(651) 227-9990

MANSFIELD, TANICK & COHEN, P.A.
Seymour J. Mansfield, I.D. No. 67271
Richard J. Fuller, I.D. No. 32669
V. John Ella, I.D. No. 24982
1700 Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402-1409
(612) 339-4295

HUNEGS, STONE, KOENIG, LENEAVE & KVAS, P.A.
William Kvas
1650 International Centre
900 Second Avenue South
Minneapolis, MN 55402
(612) 339-2077

PROVIST☆HUMPHREY, L.L.P.
YOUNGDAHL☆SADIN, P.C.
Joseph Arshawsky
9621 Fourth Street N.W.
Albuquerque, NM 87114
(505) 792-8500

WOLF, POPPER, ROSS, WOLF & JONES
Peter Safirstein
845 Third Avenue, 12th Floor
New York, NY 10022
(212) 451-9626

ZIMMERMAN & REED, PLLP
Charles S. Zimmerman, I.D. No. 120054
Keelyn M. Friesen, I.D. No. 246736
Jennifer K. Sustacek, I.D. No. 251598
901 Third Street North, Suite 100
Minneapolis, MN 55401-4123
(612) 341-0400

CHARLES H. JOHNSON & ASSOCIATES
Charles H. Johnson
2599 Mississippi Street
New Brighton, MN 55112
(651) 633-5685

Attorneys for Plaintiffs James D. Koenig, on behalf of himself and the class of similarly situated consumers, et al., Respondents

July 12, 2002

(3)

Supreme Court, U.S.
FILED
AUG - 1 2002
OFFICE OF THE CLERK

No. 01-1811

IN THE

Supreme Court of the United States

DAVID R. JANSEN, WILLIAM J. LORENCE, and N. PETER KNOLL,

Petitioners,

v.

US BANK NATIONAL ASSOCIATION, ND, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

N. PETER KNOLL
815 Emery Street
Longmont, CO 80501
(303) 774-8013

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

1195

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 3
I. The Eighth Circuit's Decision Conflicts with Decisions from Numerous Other Circuits. 3
II. The Failure To Require District Courts To Articulate Their Reasoning Conflicts with Decisions of This Court and Makes Review for Abuse of Discretion Impossible 4
III. This Case Raises Important National Issues that Should Be Resolved by This Court. 7
CONCLUSION 8

TABLE OF AUTHORITIES

Pages

Cases

Amchem Prods., Inc. v. *Windsor*, 521 U.S. 591 (1997).....4

Hensley v. *Eckerhart*, 461 U.S. 424 (1983).....6

In re Cendant Corp. PRIDES Litig., 243 F.3d 722 (CA3), *cert. denied*, 120 S. Ct. 202 (2001).....5, 7

In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (CA3), *cert. denied*, 516 U.S. 824 (1995).....7

Malchman v. *Davis*, 706 F.2d 426 (CA2 1983).....5

Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. *Anderson*, 390 U.S. 414 (1968).....5

Weinberger v. *Kendrick*, 698 F.2d 61 (CA2 1982), *cert. denied*, 464 U.S. 818 (1983).....3

Rules

Fed. R. Civ. P. 54(d)(2) 6

IN THE

Supreme Court of the United States

DAVID R. JANSEN, WILLIAM J. LORENCE, and N. PETER KNOLL,

Petitioners,

v.

US BANK NATIONAL ASSOCIATION, ND, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

Respondents do not seriously dispute that six circuits require a non-boilerplate explanation of the reasons for approving a class action settlement and attorneys' fees, whereas the Eighth and First Circuits require no such explanation by a district court. Nor do respondents offer any defense of the Eighth Circuit's rule approving such silent supposed exercises of discretion by district courts. Instead they pretend that the settlement terms and fees in this case were defensible and continue, like the courts below, to remain silent to the objections raised by petitioners. The obligation to provide a cogent explanation for the approval of class action settlements and fee awards, however, lies first and foremost with the district court, and this Court should grant certiorari to establish that obligation uniformly across the circuits.

STATEMENT OF THE CASE

Without conceding the many other dubious and unsupported factual claims offered by respondents, only one flagrant misstatement implicates the issue of whether to grant certiorari. Respondents falsely assert that petitioners before the Eighth Circuit "did not positively contest or argue that the settlement was in any way inadequate or unfair." BIO 6. But even a cursory review of the briefs below shows that petitioners most certainly *did* challenge the fairness and adequacy of the settlement and fee award. *See, e.g.*, Appellants' Brief, *In re U.S. Bancorp Litig.*, Nos. 01-1217 & 01-1242 (CA8, Apr. 19, 2001), at 40 (noting that "there is nothing in the record to support the reasonableness of the settlement amount" and arguing that the amount constitutes little more than a nuisance recovery rather than any consideration for the claims themselves); *id.* at 41-42 (noting that "there is nothing in the record to support the disparate treatment of checking and credit card customers" and arguing that such treatment is a sign of unfairness); *id.* at 45-47 (objecting to lack of scrutiny of attorneys' fees and noting zero-sum nature of case whereby such fees reduce recovery to class; noting court's apparent application of a 25% fee percentage, but incorrect application of that percentage to $5 million rather than correct amount of $3.5 million); *id.* at 50-55 (arguing that even 25% award was excessive given rapid settlement of the case and other factors); *id.* at 60-61 (objecting to disproportionate payments to class representatives where there was no evidence that representatives undertook any additional effort whatsoever and never had to go through discovery). Petitioners, of course, also squarely raised their claim that the district court was required to provide reasoned explanations for its approval of the settlement and fee award. *Id.* at 34-40, 44.

Because petitioners raised both their substantive objections to the settlement, and their procedural objection to the district court's refusal to explain its dubious decisions, the question in this petition is properly presented for review.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS FROM NUMEROUS OTHER CIRCUITS.

Respondents offer no coherent challenge to the existence of a combined 6-2 conflict on the issues presented by this case. The Eighth Circuit's rule *assuming*, even absent any reasoning from a district court, the proper exercise of discretion in a class settlement approval is in conflict with the rule in three and six other circuits, respectively, requiring express reasoning from a district court regarding approvals of settlements and attorneys' fees. Pet. 7-11.[1]

Instead respondents merely assert, without explanation, that there "is no conflict in the courts," and claim, without case citation, that "the Eighth Circuit does require that the district court have shown it made a reasoned judgment about the settlement after hearing opposing views." BIO 7, 8. Of course, the Eighth Circuit disagrees with respondents' claim and expressly *refuses* to require a district court to articulate its reasons, if any, for reaching a decision on a class action settlement. Pet. 9-10 (discussing cases establishing the Eighth Circuit rule). The most the Eighth Circuit requires seems to be a hearing whereby the court goes through the motions of feigning attention to any objections, but given that district courts are not required to address such objections with anything beyond a boilerplate rejection of the lot of them, a hearing alone is hardly a sufficient incentive for judicial diligence. While "hearing opposing views" is certainly a useful start for the judicial function, in the Eighth Circuit it also seems to be the end of the function, and there is no requirement that the

---

[1] *Cf. Weinberger* v. *Kendrick*, 698 F.2d 61, 82 (CA2 1982) ("we reaffirm the duty of district judges in this circuit to make a considered and detailed assessment of the reasonableness of proposed settlements of class actions, as held by the [Third and Seventh Circuits]"), *cert. denied*, 464 U.S. 818 (1983).

court engage in reasoned decision making regarding such opposing views when it chooses to approve a settlement. [2]

Only the First Circuit has sided with the Eighth Circuit in adopting a rule that either ignores the complete lack of analysis by a district court or substitutes the circuit court's discretion where the district court shows no evidence of having exercised its own. Pet. 10. Because other circuits rightly demand more in the settlement approval context, and because the minority views of the First and Eighth Circuits appear well-entrenched, only a decision of this Court will uproot the error established in those circuits.

II. THE FAILURE TO REQUIRE DISTRICT COURTS TO ARTICULATE THEIR REASONING CONFLICTS WITH DECISIONS OF THIS COURT AND MAKES REVIEW FOR ABUSE OF DISCRETION IMPOSSIBLE.

The need for this Court's review is accentuated by the absurdity of a rule that enables and encourages an absence of reasoning by the lower courts in precisely those circumstances where *extra* vigilance is required. As this and many other courts have often recognized, class action settlements are fraught with the potential for abuse because the adversarial process breaks down in the settlement and approval process and unnamed class members can be sacrificed to the interests of the negotiating parties and their attorneys. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 620 (1997) (noting, with regard to class certification requirements, the need for

---

[2] Respondents' irrelevant observation regarding the need to prevent settlement hearings from becoming full trials on the merits, BIO 7, has nothing to do with the split among the circuits regarding the need for a district court to memorialize a bare modicum of coherent reasoning. Furthermore, none of the majority circuits requires a full-blown trial at the settlement hearing, nor is that what petitioners seek. Rather, petitioners and six other circuits simply expect a district court to provide an adequate basis for review and to provide some evidence that it has actually exercised its discretion rather than abdicated to settling counsel.

"undiluted, even heightened, attention in the settlement context" to provisions designed to protect absent class members); *In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 730 (CA3) ("the danger inherent in the relationship among the class, class counsel, and defendants 'generates an especially acute need for close judicial scrutiny of fee arrangements' in class action settlements") (citation omitted), *cert. denied*, 120 S. Ct. 202 (2001); *Malchman* v. *Davis*, 706 F.2d 426, 432 (CA2 1983) (court must be doubly careful in scrutinizing a settlement where class is certified purely for settlement purposes).

Respondents do not attempt to defend the source of the Eighth Circuit's error – the unfortunate *dicta* from *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson,* 390 U.S. 414, 437 (1968). *See* Pet. 11-13. Instead, they quote the discussion from *Protective Committee* eschewing "mere boilerplate," BIO 7, oblivious to the fact that such language is precisely in conflict with the Eighth Circuit's acceptance of the district court's boilerplate in this case.[3] And respondents offer no defense of the conflict between the decision below with regard to attorneys' fees and this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983), and Federal Rule of Civil Procedure 54(d)(2). Pet. 13-14.

Given the nature of discretionary decisions, the only genuine safeguard against abuse is the procedural requirement of an explanation by the district court demonstrating whether and how it exercised its discretion. Without some articulated reasoning beyond mere boilerplate, it is virtually impossible to exercise appellate review for abuse of discretion.

---

[3] Respondents' subsequent attempt to distinguish *Protective Committee* on the ground that a hearing was held in this case, BIO 7-8, is hardly relevant to this Court's expectation of the reasoned decision making and explanation that must *follow* such a hearing. As for any indicia of such post-hearing reasoning, the material discussion in this case is just as cursory – a bare four sentences of boilerplate – and the record just as bereft of explanation or support as it was in *Protective Committee*.

Even now, for example, respondents offer precious little that would give an appellate court confidence in either the reasoning or the results below. Rather than address the objections made by petitioners, respondents instead disparage the very class claims that they themselves filed, BIO 2-3, seemingly in defense of the low overall settlement total of $3.5 million for the 6 million persons receiving the class notice. But neither the opinions below nor the record in general offer much support for class counsel's dim views and sudden change of heart regarding the merits of their complaints.[4] Even assuming less than overwhelming merit to the class complaint, respondents point to nothing at all that would permit cogent review of the many additional factors that a district court must consider in evaluating a settlement. Pet. 12. And, of course, there is absolutely nothing in the opinions, the record, or the Brief in Opposition, that justifies the settlement's discriminatory treatment of credit card customers relative to checking account customers or the disproportionate recoveries given to class representatives who seem to have done nothing at all given how quickly the case was settled. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 808 (CA3) ("One sign that a settlement may not be fair is that some segments of the class are treated differently from others."), *cert. denied*, 516 U.S. 824 (1995).[5]

---

[4] Respondents' reference, BIO 2, to a single adverse ruling from a North Dakota state trial court is hardly sufficient grounds for class counsel to be allowed to cut and run without some explanation by the district court itself regarding its views on the merits of that non-authoritative decision and on the merits of the case in relation to the settlement.

[5] Respondents illogically attempt to imply that the settlement was somehow fair because only slightly more that 1% of notice recipients submitted claims (81,695 out of 6 million), and only slightly less than 1% of claimants submitted objections (70 out of 81,695). BIO 4. But nothing in the record or the Brief in Opposition identifies whether the roughly 1% claims and objection rates are high or low relative to other class action settlements, and they studiously ignore the more plausible inference that the

The deficiencies of allowing district courts to dispense with even the pretense of analysis is further illustrated by class counsel's current lackadaisical efforts to justify their fees with claims of having attended "numerous meetings," having performed "[s]ignificant work" on the settlement, and having to divide fees among ten sets of class counsel. BIO 3-4, 6. But nothing in the decisions or the record below suggests that the district court considered, much less accepted, class counsel's current explanations. Indeed, it is hard to tell whether the court awarded fees based on a percentage-recovery scheme (as seems likely), or based upon a lodestar analysis (using the cursory time and expense chart submitted by class counsel, Pet. App. G1-G4). *See In Re Cendant*, 243 F.3d at 733-35 (vacating fee award where district court failed to identify method used, ignored factors required for determining fees, and failed adequately to explain its reasoning). And under either method, fees likely should have been adjusted downward given respondents' concession, BIO 3, that "[b]ecause of the resolution of the Attorney General's action shortly after the litigation was commenced, there was no dispute about the Bank's actions, but only what liability could be based on those undisputed actions."

III. THIS CASE RAISES IMPORTANT NATIONAL ISSUES THAT SHOULD BE RESOLVED BY THIS COURT.

The constant potential for abuse in class action settlements, and the frequently appalling spectacle of class attorneys receiving huge windfalls while class members receive at best a pittance, make the question presented by this petition one of national importance. The right of class members to object, and the right of objectors to appeal, will be rendered largely meaningless in circuits where district courts need not, and thus often will not, address the objections, and where cir-

---

low claims rate suggests the settlement was utterly worthless to 99% of those whose claims would be extinguished by the settlement.

cuit courts will affirm settlements regardless of their inability to determine whether discretion was even *exercised* by the district court, much less abused.

Such a charade at judicial decision making not only deprives objecting class members of any *meaningful* day in court, it also deprives class members and the public of any basis for confidence that justice was done, thus bringing the courts and the legal profession into disrepute. In order to promote both the actuality of reasoned decision making in the district courts, and the confidence-generating indicia of such decision making, this Court should take up the question presented in this petition and require district courts to both engage in and explain their reasoning when approving class action settlements and awards of attorneys' fees and expenses.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

N. PETER KNOLL
815 Emery Street
Longmont, CO 80501
(303) 774-8013

Counsel for Petitioners

Dated: August 1, 2002.